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In The

# Supreme Court of the United States

October Term, 1994

ROBERT RUYLE, ELIZABETH RUYLE, HARVEY FRANSEN, MARJORIE FRANSEN, YVONNE FRANSEN, GEORGE FRANSEN, JAMES FRANSEN,

*Petitioners,*

vs.

CONOCO, INC.,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED FOR REVIEW

1. Whether an appellate court, after a jury verdict in favor of the plaintiffs for actual and punitive damages, may review a pretrial order denying defendant's motion for summary judgment and reverse, based upon collateral estoppel, the plaintiffs' jury verdict when the defendant failed to raise the collateral estoppel issue in any trial or post trial motions and did not object to a jury instruction that is contrary to its appellate position?

2. Whether applying collateral estoppel to an agency finding, which by statute, case law and the agency's own admission has no jurisdiction to hear the underlying action, is a denial of due process?

3. Whether collateral estoppel may be afforded to the findings of an administrative agency concerning public rights, which agency admittedly lacks jurisdiction over the claims which were asserted in the private lawsuit depriving Petitioner of his constitutional right to notice?

4. Whether a jury award in excess of $1.2 million by clear and convincing evidence can be vitiated by application of collateral estoppel to an Order of an agency that (1) had no jurisdiction to determine the underlying dispute and (2) had no ability to have the matter decided by a jury, without unconstitutionally depriving Petitioner's right to a jury?

5. Whether the decision of the Tenth Circuit violates the prohibition against reexamination of issues decided by a jury mandated by the Seventh Amendment of the Constitution?

## PARTIES

The parties to the proceedings in the court below were Robert Ruyle, Elizabeth Ruyle, Harvey Fransen, Marjorie Fransen, Yvonne Fransen, George Fransen, James Fransen and Conoco, Inc., a wholly owned subsidiary of E I DuPont DeNemours and Company.

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## OPINIONS BELOW

The December 20, 1994 opinion of the United States Court of Appeals for the Tenth Circuit is reported at 44 F.3d 837 and appears in the Appendix at A-1 to A-20. The September 3, 1992 judgment of the United States District Court for the Western District of Oklahoma is unreported and in the Appendix at A-21 to A-22. The Court of Appeals Order, dated February 7, 1995, denying Petitioners' petition for rehearing is unreported and is in the Appendix at A-39 to A-40.

## JURISDICTIONAL STATEMENT

The Court of Appeals denied Petitioners' petition for rehearing on February 7, 1995. Jurisdiction of this Court is proper under 28 U.S.C. § 1254.

## STATUTES INVOLVED

The issues raised by this appeal involve 28 U.S.C. § 1291, which sets forth the jurisdiction of the appellate court to review final orders of the trial court.

Further, the decision rendered by the appellate court raises the issue of the right to trial by jury and the prohibition against reexamination of issues decided by a jury, mandated by Seventh Amendment to the U.S. Constitution and the due process rights guaranteed by the 5th and 14th Amendments to the U.S. Constitution and materially changes the application of Rule 51 of the Federal

Rules of Civil Procedure and expands well settled standards of reviewability.

## STATEMENT OF THE CASE

The Ruyles and Fransens ("Petitioners") own the mineral interests underlying Section 14, Township 12 North, Range 16 West, Custer County, Oklahoma ("Section 14"). Section 14 consists of 640 acres. Section 14 was established by the Oklahoma Corporation Commission as a 640 acre drilling and spacing unit for an oil and gas bearing formation known as the Cherokee. Conoco, Inc. ("Respondent") has been the operator of a single well drilled in Section 14 in 1981 known as the Meachum #1-14. Respondent also holds certain oil and gas leases granted by the Fransens covering their mineral interests in Section 14.

In addition to its ownership of leasehold interests in Section 14, Respondent owned leasehold interests underlying Section 15, the section directly adjacent to Section 14 to its west. The single well drilled in Section 15 was known as the Downing #1-15 and was located approximately 660' from the perimeter of Section 14.

The 660' distance is significant since it was closer to the perimeter of Section 14 than is ordinarily permitted by the established rules of the Commission.

Petitioners filed an action against the Respondent on February 22, 1991 in the Oklahoma State Court. All of the Petitioners asserted a claim against the Respondent for a

breach of Respondent's fiduciary duty owed to Petitioners by Respondent by virtue of its being operator of Section 14. The Petitioners contended that the Respondent has failed to protect Section 14 against drainage from the Downing #1-15 well. Unknown to Petitioners, Respondent owned a substantial interest in the Downing #1-15 well. Therefore, the failure to protect against the drainage, which was fraudulent, was intentional to benefit Respondent to the detriment of the Petitioners and in violation of the duty of good faith and loyalty imposed on Respondent by the fiduciary relationship.

The Fransens also asserted similar claims against Respondent arising from the duties owed to them by Respondent and other claims arising from the contractual relationship that existed between them.

The Respondent removed the action to the United States District Court for the Western District of Oklahoma based on the diversity in citizenship of the Petitioners and the Respondent. Petitioners claim against Respondent was in excess of $50,000.00, exclusive of costs. Respondent was a citizen of Texas and Delaware for diversity purposes and Petitioners were citizens of states other than Texas or Delaware.

The Petitioners presented their case before a jury in June, 1992 as to all issues except punitive damages. Included in Petitioners' evidence was the Respondent's preparation of two different sets of maps for the area. One set was used by the Respondent for its own internal decisions. The other set of maps was used by the Respondent before the Commission in an effort to manipulate the Commission's findings to Respondent's benefit.

The Respondent moved for judgment at the close of the Petitioner's case. Respondent did not, in its motion or anywhere else, contend at trial that the Commission order was to be afforded collateral estoppel effect. The motions were denied. Respondent than presented its case to the jury. During its case, Respondent was allowed to introduce as evidence the order entered by the Commission denying the application by a third party to drill the additional well.

After the close of the evidence, the parties had their required Rule 51 conference. One of the instructions provided that the jury could give the Commission order such weight that they determined was appropriate but that it was not binding. Respondent made no objection to this jury instruction. After being so instructed, the jury returned a verdict in favor of Petitioners for compensatory damages.

Prior to the second stage of the bifurcated trial, the trial court, in accordance with the provisions of 23 O.S. § 9 made a determination, on a clear and convincing standard, that the actions of the Respondents had been willful and intentional and the punitive damage cap was not applicable to Petitioner's claims. Evidence on the issue of punitive damages was submitted to the jury. After the close of the evidence, the jury was then instructed on the issue of punitive damages. The jury returned a verdict for punitive damages against Respondent totaling $1,140,000.00.

Respondent filed a motion for new trial and judgment notwithstanding the verdict. Respondent raised several grounds for relief. Respondent did not contend

that the plaintiff's claims were barred by collateral estoppel based on the Commission's findings.

The only time this issue was asserted by the Respondent prior to its brief before the Tenth Circuit, was in the pre-trial motion for summary judgment, which had been denied by the trial court.

## REASONS FOR GRANTING THE WRIT

I. The opinion of the Tenth Circuit fundamentally alters the scope of appellate review by, in the words of the Tenth Circuit court, planting a "time bomb set to go off on appeal". *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th Cir. 1992).

II. The opinion of the Tenth Circuit Court of Appeals in finding that an appeal from the denial of a motion for summary judgment was properly before the court is in direct conflict with decisions of the Second, Sixth, Eighth, Ninth, Eleventh and Federal Circuits.

III. The decision of the Tenth Circuit is in direct contradiction of Rule 51 of the Federal Rules of Civil Procedure by permitting Respondent in effect to appeal from an instruction to which it did not object.

IV. The Tenth Circuit decision would deprive Petitioners of due process by barring their private action without affording them notice that their private rights can be forfeited.

V. The decision of the Tenth Circuit denies Petitioners of their right to a jury trial by denying Petitioners

of this jury verdict on the basis of an Oklahoma Corporation Commission agency order, when the Oklahoma Corporation Commission admitted it does not have jurisdiction to adjudicate private rights.

VI. The decision of the Tenth Circuit violates the prohibition against reexamination of issues decided by a jury mandated by the Seventh Amendment of the Constitution.

## I.

## RESPONDENT WAIVED AND ABANDONED ITS CLAIM THAT PETITIONERS' CAUSE OF ACTION WAS BARRED BY COLLATERAL ESTOPPEL WHEN THEY DID NOT RAISE THE ISSUE AT TRIAL, AGREED WITH THE TRIAL COURT THAT THE ORDER WAS NOT BINDING AND DID NOT OBJECT TO A JURY INSTRUCTION ADVISING THE JURY THAT THEY WERE NOT BOUND BY THE ORDER

### 1. Denial of a Motion for Summary Judgment is Not Reviewable.

The Circuit Courts that have addressed the issue of whether an interlocutory pretrial order is reviewable on appeal, when the issue has not been reached at trial, have uniformly held that it is not reviewable on appeal after a trial on the merits is conducted. *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (D.C. Cir. 1986); *Chapell & Co. v. Frankel*, 367 F.2d 197 (2nd Cir. 1946); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *Bottineau Farmers Elevator v. Woodward Clyde*, 963 F.2d 1064, 1068 (8th Cir. 1992); *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987); *Holley v. Northrup Worldwide Aircraft Services*, 835

F.2d 1375 (11th Cir. 1988). Indeed, until the panel's decision in this case, the Tenth Circuit also held that the denial of a motion for summary judgment is non-reviewable. See *Boyles Galvanizing & Plating Co. v. Hartford Acci. & Indemnity Co.*, 372 F.2d 310 (10th Cir. 1967) and *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248 (10th Cir. 1992).[1]

The rationale for these courts' conclusion is set forth by the Ninth Circuit in *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987). The court held:

> To be sure, the party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decided in his favor. The injustice is arguably greater when the verdict goes against him. However, we believe it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment demonstrated the need for a trial. After considerable research, we have found no case in which a jury verdict was overturned because summary judgment had been improperly denied. We hold, therefore, that the denial of a motion for summary judgment is not reviewable on an appeal

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[1] While the Tenth Circuit attempted to distinguish *Whalen* by the language found in its opinion on re-hearing, it then suggested that *Whalen* permitted appeals from motions for summary judgment based on legal issues even if those issues had not been raised at trial. A-7. In fact, the *Whalen* Petition for Rehearing showed that the Tenth Circuit had factually erred when it said that the legal position in the case had not been raised at trial.

> from a final judgment entered after a full trial on the merits.

833 F.2d at 1359.

As noted in a later Ninth Circuit case, *Lum v. City and County of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992), the appropriate procedure for review of an interlocutory order is 28 U.S.C. § 1292 (b). Notwithstanding the denial of such a request in *Lum*, the court refused to consider the interlocutory denial of a motion for summary judgment. Here, the Respondent never made any effort to obtain a review under 28 U.S.C. § 1292 (b). See also *Chapell & Co. v. Frankel*, 367 F.2d 197, 201 (2nd Cir. 1946).

The one circuit that has partially strayed from this view is the Fifth Circuit which has held that any review of an interlocutory order denying a motion for summary judgment can be reviewed under an abuse of discretion standard. *National Screen Service Corp. v. Poster Exchange*, 305 F.2d 647, 651 (5th Cir. 1962). This standard of review was not applied by this Tenth Circuit when it reviewed the trial court's denial of a motion for summary judgment.

**2. The Opinion By The Tenth Circuit Fundamentally Changes The Standard of Review.**

In *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th Cir. 1992) the Court, agreeing with the Eleventh Circuit case *Holley v. Northrop Worldwide Aircraft Services Corp.*, 833 F.2d 1375 (11th Cir. 1988) held that:

> "[S]ummary judgment was not intended to be a time bomb planted within the litigation at its

> early stages and exploded on appeal." *Holley*, 835 F.2d at 1377-78. We now hold that even if summary judgment was erroneously denied, the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law ("JAMOL") and appellate review of those motions if they were denied.

With this holding, the Tenth Circuit found that Mr. Whalen's argument was correct: that the district court's denial of defendant's Motion for Summary Judgment was moot and could not be raised on appeal after a trial on the merits when the issues were not raised in defendants' motion for directed verdict. In fact, the Tenth Circuit held that the only manner to appeal the denial of summary judgment is to appeal from a motion for judgment as a mater of law ("JAMOL").

Equally important is the long standing precept that an issue abandoned or conceded at trial cannot be resurrected on appeal. See *Drop Dead Co. v. S.C. Johnson & Son, Inc.*, 326 F.2d 87 (2nd Cir. 1963) (if an issue is conceded below it cannot be raised on appeal); *United States v. Allgheny-Lundlum Industries, Inc.*, 517 F.2d 826, 840 (5th Cir. 1975) (court would not consider issues that were not raised in the district court).

Here, the Respondent's counsel told the trial court:

> I want to clarify my motion, I am not asking you to do that [make a ruling on the issue of collateral estoppel]. I agree exactly with what you told me. Sir, that's all I asked for. The reason I raise this motion is, their evidence, the Plaintiff's evidence that has come forth, did not address the rights of the offset owners, at all,

> not one time, in my opinion. I agree that they [the jury] need to make that decision. They [the jury] need to know that the Commission did this [entered an order], but it is not binding on them. I don't disagree.[2]

A-42 to A-43. [parentheticals added for clarification].

Respondents failed to raise the issue of the order's collateral estoppel effect, and agreed with the trial court's ruling, therefore that issue should not have been reviewed by the Tenth Circuit.

**3. Defendant Did Not Object To The Jury Instruction.**

The Court made the following instruction:

> You are instructed that the matter presented to the Oklahoma Corporation Commission and findings and order issues by the Oklahoma corporation Commission . . . may be considered by you as evidence in this case but *should not be considered as binding or conclusive as to any issue.* You may consider such findings and orders and give them such weight, if any, as you may think they deserve.

Instruction No. 21 A at A-41. (emphasis added)

While Respondent asserted as an affirmative defense that the Commission's order had preclusive effect, their failure to object to the jury instructions as required by

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[2] In fact, defendant's counsel was correct for *Tidewater Oil Co. v. Jackson*, 320 F.2d 157 (10th Cir. 1963) specifically holds that a Commission order will *not* preclude a claim to damages.

F.R.Civ.Pro. Rule 51, resulted in an abandonment of that defense.[3]

The Eighth Circuit Court of Appeals stated in *Sterling Drug, Inc. v. Cornish*, 30 F.2d 82, 86 (8th Cir. 1967):

> The purpose of requiring a party to object is to inform the judge that there is an issue of law, so that the judge may consider whether there has been error and make appropriate corrections.

In other words, in order to preserve an error of law, Respondent must have objected to the jury instruction setting forth that law.

Other courts have found that when the defendant failed to object to instructions on issues previously raised, those issues were abandoned and could not be resurrected on appeal. See *Bituminous Fire & Marine Ins. Co. v. Izzy Rosen's, Inc.*, 493 F.2d 257 (6th Cir. 1973) (defense of contributory negligence); *Williams v. Thomas*, 692 F.2d 1032 (5th Cir. 1982) (good faith defense to a pendent state assault and battery claim); *Needham v. White Laboratories*, 639 F.2d 394 (7th Cir. 1981) (defendant did not object to a jury instruction regarding when the cause of action accrued).

While the panel found "no significance in Conoco's failure to object to the court's instructions" on the issue of the Commission's previous orders, (A-11), the Tenth Circuit did not articulate why it believes that failure was not

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[3] Respondent's agreement that the order was not preclusive and that the jury should not be instructed that it was preclusive provides an independent basis for prohibiting review of this issue.

significant. Presumably, the Tenth Circuit drew a distinction between an appeal from a jury instruction and the underlying issue framed by the jury instruction. In fact, their is no such distinction and by failing to object to the instruction, Respondent acquiesced that the law of the case was that the order was not binding.

## II

## THE TENTH CIRCUIT'S DECISION DENIES PLAINTIFFS DUE PROCESS

In *Tidewater Oil Co. v. Jackson*, 320 F.2d 157 (10th Cir. 1963), the Court held that where a tribunal had no power to adjudge tort liability it could not deprive a tort claimant of his day in court on that issue by an adjudication of the operative facts upon which the tort claim rests. Applied to the case at bar, *Tidewater* holds that the plaintiffs can not be precluded on the issues of fraudulent drainage by the Commission findings or orders.[4] The Tenth Circuit held in the strongest possible terms that a cause of action existed even if defendant was acting pursuant to a lawful order. *Tidewater*, 320 F.2d at 161. The Tenth Circuit emphasized the distinction between the Commission and the court:

> It is wholly inadmissible and incompatible with fundamental principles of due process to hold

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[4] This case is stronger since the facts of wrongdoing that were present in this case were not present in *Tidewater*. Here, both the jury, by a preponderance of the evidence, and the trial court, using a clear and convincing standard, found that defendant breached their fiduciary duty by their wrongful and fraudulent conduct before the Commission.

> that a tribunal, possessing no power to adjudge tort liability, may nevertheless deprive a tort claimant of his day in court on that issue, by conclusive adjudication of the operative facts upon which his claim must rest.

320 F.2d at 162.[5]

The decision in *Tidewater* prevented the decisions of the court empowered with jurisdiction of claims becoming pro forma. The Oklahoma Supreme Court has held that the proper forum for plaintiffs' claims is a district court, not the Commission. *Leck v. Continental Oil Co.*, 800 P. 2d 224 (Okla. 1989). In *Leck*, the court stated:

> Title 52, O.S.Supp. 1988, § 87.1, defines the Commission's authority relative to a common source of supply and well spacing and drilling units. However, we have construed this statute to vest jurisdiction of public right disputes in the commission, whereas, disputes over private rights are properly brought in the district court. 800 P.2d at 226.

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[5] The rationale of *Tidewater* is consistent with the Oklahoma Supreme Court's very recent decision *Carris v. Thomas*, No. 82,952 (Okla. April 4, 1995) where the court refused to apply collateral estoppel to findings made in the arbitration of a contract claim in a subsequent suit based in tort. This decision is consistent with *Fent v. Oklahoma Natural Gas Co.*, Case No. 79243 (Okla. October 4, 1994), wherein the Oklahoma Supreme Court upheld a state appellate court's finding that claims for money damages based upon breaches of contract and in tort are properly before a district court, not the Commission. See *Fent v. Oklahoma Natural Gas Co.*, 804 P. 2d 1146 (Okla. App. 1990).

As to private disputes such as this, the *Leck* court held that the Commission does *not* have jurisdiction to adjudicate them:

> [W]hen the appellants applied for an order to restrict the allowable on the Wosika #1 well "in order to protect the correlative rights of all parties to the common source of supply," they properly brought the application before the commission. However, when a dispute arises between a lessor and a lessee regarding the lessee's breach of an implied covenant, the rights involved enter the realm of the private world and are proper disputes for the district court to resolve because they involve issues concerning the construction of a private contract between parties. *Samson Resources v. Corporation Commission and TXO Production Corp.*, Okl. 742, P.2d 1114, 1116 (1987). Therefore, the appellants' action for damages for the lessee's alleged breach of an implied covenant to protect from drainage is a private action arising from their contract and does not involve the correlative rights of the "public". 800 P.2d at 226.

If the operative facts for these claims may be decided by the Commission, the jurisdiction of the district court is hollow.[6]

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[6] The panel's reliance on the Oklahoma Court of Appeal's decision in *Pelican Production Corp. v. Wishbone Oil & Gas Co. Inc.*, 746 P. 2d 209 (Okla. Ct. App. 1987) is misplaced since under Oklahoma law it is not precedent. Rule 1.22 (c)(B), Oklahoma Rules of Appellate Procedure, Title 12, Ch. 15, App. 2. Indeed, the Tenth Circuit previously did not look to it. The Oklahoma Supreme Court's decision in *Leck v. Continental Oil Co.*, 800 P. 2d 224 (1989) was in response to certified questions by the Tenth

And, indeed, an Advisory Task Force to the Commission determined that the collateral estoppel effect should not be given to the agency's orders in private disputes:

> Legislation should be pursued to keep Commission findings of rules violation from being treated as dispositive as to liability in civil cases in the court system. Otherwise, the Commission becomes the actual court of decision in civil disputes involving large sums of money and private parties, contrary to its constitutional mandate. Commission enforcement hearings become clogged with all the due process attributes of the court system, such as contested depositions, interrogatories, etc. and each cause will be exhaustively litigated before ALJ's who may or may not have the necessary background to conduct such a complex hearing. Actions of the Commission on rules violations should constitute "good" evidence in state and federal courts, but the court should independently ascertain civil liability of the parties. Otherwise, an administrative fine procedure will be very difficult to administer.

*Report, Advisory Task Force to the Oklahoma Corporation Commission,* December 9, 1991.

This is the same position taken by the administrative agency, whose findings were before this court in *Astoria*

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Circuit seeking a definitive answer as to jurisdiction issues. More importantly, it is inconsistent with subsequent decisions by the Oklahoma Supreme Court, e.g. *Leck v. Continental Oil Co.*, supra, and *Fent v. Oklahoma Natural Gas, Co.*, Case No. 79243 (Okla. October 4, 1994) and Oklahoma Court of Appeals, e.g. *Fent v. Oklahoma Natural Gas, Co.*, 804 P. 2d 1146 (Okla. App. 1990).

*Federal Savings & Loan Assoc. v. Solomino*, 111 S.Ct. 2166 (1991). That agency, like the Commission, did not want a court to rely on its determinations to resolve private claims.

In *Astoria*, the question presented was whether claimants under the Age Discrimination Act are collaterally estopped to relitigate in federal court the judicially unreviewed findings of a state administrative agency. This Court found that judicially unreviewed findings of a state agency had no preclusive effect on federal proceedings.

## III

## THE NOTICE GIVEN IN AN AGENCY PROCEEDING IS INSUFFICIENT FOR THE EFFECT GIVEN TO ITS RULING BY THE COURT OF APPEALS.

In *Goss v. Lopez*, 419 U.S. 577 (1975) this court held that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every situation [citation omitted]." 419 U.S. at 578. The ". . . timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved." 419 U.S. at 579.

Certain standards to afford due process have been incorporated into the civil procedure rules of the courts. Rule 4 requires service of a summons and complaint. The summons clearly sets forth that a default will be entered for the relief claimed in the complaint if a response is not made. The complaint must give notice of the claim being asserted. Rule 8. Upon default, a court is limited to granting the relief sought by the plaintiff.

Petitioners could not assert their rights before the Commission because they did not receive proper notice of the proceedings. They were not informed that the proceedings had to do with drainage issues. The only notices sent to the appellants from the Commission regarding the proceedings before the Commission on their face do not inform Appellants of the purpose of the proceedings before the Commission. Notice of Commission proceedings are only required to be sent to parties and interested individuals by regular mail and by publication. *See* 52 O.S. § 87.1(e), § 97, § 107 and § 241. The Commission did not provide notice by publication.

The Applicant or Respondent never gave Petitioners any notice that either would seek to use the proceedings before the Commission to defeat their day before a court that could provide Petitioners redress for their claims. Due process would require such notice to be given in the proceedings before the Commission.

Respondents contend that the Commission proceedings should have the same preclusive effect as proceedings before the district court; however, the notice requirements in district court are much more stringent and protect the interests of all parties. A summons is required to include statements to the effect that failure to appear in court will result in an adverse ruling to the party's interest and that you may consult an attorney prior to filing a response. Also, service upon parties in state and federal proceedings must be made by personal service or by certified mail restricted to the addressee. 12 O.S. § 2004; Rule 4 of the Federal Rules of Civil Procedure.

Under these circumstances, allowing the Petitioners' private claims to be decided before the Commission violates due process.

## IV.

## THE RIGHT TO TRIAL BY JURY MAY NOT BE EXTINGUISHED THROUGH JUDICIAL OR LEGISLATIVE ACTION

This court has held that indirect attempts to undercut the right to a trial by jury must be rejected. *Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 897 (1962). In *Dairy Queen*, the court refused to allow the right to trial by jury to be eliminated by the characterization of legal claims as merely incidental to equitable claims. The result rejected by the court in *Dairy Queen*, has occurred here. Petitioners' claims, that were properly before a jury, and, in fact, were decided by a jury, were then reversed by the Tenth Circuit.

In *Granfinanciera S.A. v. Nordberg*, 109 S.Ct. 2782, 2793 (1979) this court set forth the limitation on Congress in regards to this issue. The court held:

> Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment. . . . But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury . . . to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agency or courts of equity all causes of action not grounded in state law[.]

> Wholly, private tort, contract and property cases, as well as a whole range of other cases, are not at all implicated.

109 S.Ct. at 2795.

Neither statute nor judicially created concepts, such as collateral estoppel, can constitutionally deprive Petitioners of their right to have their claims tried before a jury and not have the right foreclosed by an order in a proceeding which there was no right to a jury and the burden of proof was different.[7] The Tenth Circuit's decision crosses this constitutional boundary.

## V.

## THE APPELLATE COURT'S DECISION IS IMPROPER UNDER THE SEVENTH AMENDMENT

The Seventh Amendment provides that "no fact, tried by jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." In *Walker v. New Mexico & So. Pac. R.R.*, 165 U.S. 593, 596 (1897) this Court held that the amendment "requires that questions of fact in common law actions shall be settled by jury, and that the court shall not assume

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[7] The Commission made its findings based upon substantial evidence while at trial a preponderance of the evidence was employed. A difference in burden of proof between the two proceedings generally precludes collateral estoppel. See *In Re Four Seasons Secur. Laws Litigation*, 370 F. Supp. 219 (W.D. Okla. 1974); Restatement 2d Judgment, § 28(4); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *State of North Carolina v. Chas. Pfizer & Co.*, 537 F.2d 67 (4th Cir. 1976); and Wright & Miller, *Federal Courts*, § 422 at 214.

directly or indirectly to take from the jury or itself such prerogative." Here, the court through the application of collateral estoppel, has allowed questions of fact, actually decided by the jury, to be reexamined on the basis of findings by a commission in violation of the Seventh Amendment of the U.S. Constitution.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their petition for writ of certiorari be granted.

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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|---|---|---|
| ROBERT RUYLE and ELIZABETH RUYLE; HARVEY FRANSEN and MARJORIE FRANSEN; GEORGE FRANSEN and YVONNE FRANSEN; JAMES M. FRANSEN, | ) | Nos. 92-6402 92-6411 |
| Plaintiffs-Appellees/ Cross-Appellants, | ) | |
| v. | ) | |
| CONTINENTAL OIL CO., | ) | |
| Defendant-Appellant/ Cross-Appellee. | ) | |

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-91-379-W)

Clyde A. Muchmore of Crowe & Dunlevy, Oklahoma City, Oklahoma (Harvey D. Ellis, Jr., of Crowe & Dunlevy, Oklahoma City, Oklahoma, and Charles Puckett of Conoco, Inc., Houston, Texas, with him on the briefs), for Defendant-Appellant/Cross-Appellee.

Michael J. Rovell of Chicago, Illinois (Stephen Jones and Michael D. Roberts of Jones & Wyatt, Enid, Oklahoma; and Richard H. Hornbeek of Hornbeek, Krahl & Vitali, Oklahoma City, Oklahoma, on the brief) for Plaintiffs-Appellees/Cross-Appellants.

Before SEYMOUR, Chief Judge, and LOGAN and ANDERSON, Circuit Judges.

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SEYMOUR, Chief Judge.

Continental Oil Co. (Conoco) appeals the district court's refusal to hold plaintiffs' action collaterally estopped by a prior decision of the Oklahoma Corporation Commission. We conclude that the district court erred in failing to give the Corporation Commission order preclusive effect, and we therefore reverse.

I.

Robert and Elizabeth Ruyle, Harvey and Marjorie Fransen, George and Yvonne Fransen, and James M. Fransen (plaintiffs) own mineral interests underlying certain portions of section 14 in Custer County, Oklahoma. Continental Oil Co. (Conoco) is the lessee of the mineral interests owned by the Fransen plaintiffs. Plaintiffs sued Conoco alleging that offsetting wells were draining the productive formation underlying section 14, that Conoco had failed to protect the section from drainage, and that Conoco had failed to prudently develop the section.[1] A jury awarded plaintiffs total actual damages of $55,898.70 and total punitive damages of $1,140,000.00. In addition, the trial court ordered that Conoco either release its leases or, within 120 days, drill an additional offset well as required to fully develop the leases and to protect

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[1] Although the Ruyle plaintiffs hold mineral interests underlying section 14, they are not under a lease with Conoco. They therefore asserted a claim against Conoco only for breach of fiduciary duty.

against drainage. Conoco contends on appeal, inter alia, that plaintiffs are estopped from recovering on their claims by an order of the Oklahoma Corporation Commission (Commission) allegedly addressing the same claims plaintiffs make here and ruling that no uncompensated drainage was occurring, that Conoco had acted prudently, and that an additional well was not necessary and would in fact result in damage to the correlative rights of owners in adjacent sections.[2]

In order to prevent waste and to protect the correlative rights[3] of interested parties in a common source of oil or natural gas, the Commission is statutorily authorized to establish well spacing units. *See* Okla. Stat., tit. 52,

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[2] In addition to its collateral estoppel argument, Conoco challenges the award of punitive damages and asserts that the court erroneously instructed the jury on tolling the limitation period for plaintiffs' noncontractual claims. Plaintiffs cross-appeal the court's refusal to award them attorneys' fees under Oklahoma law. In view of our holding that the Commission's order precludes plaintiffs' claims, we need not address these other arguments.

[3] The Oklahoma Supreme Court has defined correlative rights as follows:

> The term "correlative rights" has been defined as a convenient method of "indicating that each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil and gas therefrom by lawful operations conducted on his own land, limited, however, by duties to other owners not to injure the source of supply and by duties not to take an undue proportion of the oil and gas".

*Samson Resources Co. v. Corporation Comm'n*, 702 P.2d 19, 22 (Okla. 1985) (quoting *Kingwood Oil Co. v. Corporation Comm'n*, 396 P.2d 1008, 1010 (Okla. 1964)).

§ 87.1 (1993); *see also Samson Resources Co. v. Corporation Comm'n*, 702 P.2d 19, 22 (Okla. 1985). The Commission is likewise empowered to authorize the drilling of an additional well or wells as may be necessary to prevent waste and to protect correlative rights. *Id.* Pursuant to this authority, the Commission established the original well spacing for section 14 and the adjacent sections.

In October 1990, Great Bear Exploration, Inc. (GBE), who was also an interest holder in section 14, filed applications with the Commission seeking an exception to the original spacing order and an amendment to the order to permit GBE to drill an additional well in section 14. GBE alleged the exception and amendment were necessary "to prevent waste and to protect correlative rights." Aplt. app., vol. III, at 355; *see also id.* at 359. In January 1991, plaintiffs executed agreements with GBE authorizing it to act on their behalf before the Commission and stating their belief that the existing well in section 14 was not adequately protecting against drainage by offset wells in sections adjacent to section 14. Shortly thereafter, plaintiffs filed motions to intervene in GBE's proceedings before the Commission, stating that they supported GBE's applications and desired to appear at the hearings on those applications to present arguments and/or evidence. The initial report of the administrative law judge (ALJ) reveals that plaintiffs did in fact appear at the hearings through their attorney in support of GBE's application.

The evidentiary hearings before the ALJ took place in January, February, and March of 1991. After hearing extensive evidence on the relief sought by GBE, the ALJ concluded on May 2, 1991, that the applications should be

denied. The ALJ held that Conoco had shown an additional well was not necessary and that the existing well could adequately drain the hydrocarbons underlying the unit. The ALJ further concluded that "[t]o grant an additional well would not be in the interest of the prevention of waste and the protection of correlative rights." Aplt. app. , vol. III, at 388. GBE and plaintiffs filed exceptions to the ALJ's initial report, which was upheld by the appellate ALJ. GBE and plaintiffs in turn filed exceptions to the appellate report which was upheld by the Commission on January 13, 1992. GBE appealed the order to the Oklahoma Supreme Court, and the order was affirmed on March 30, 1993.

Plaintiffs filed their original petition in this action in state court on February 22, 1991, while the administrative proceedings were pending. Conoco subsequently removed the action to federal court, and thereafter filed a motion for summary judgment based on the preclusive effect of the Commission order. On February 20, 1992, the district court entered an order denying Conoco's motion for summary judgment. The court ruled, inter alia, that the doctrine of collateral estoppel did not require the Commission's ruling to be given preclusive effect. The court based its decision upon 'its conclusion that Conoco had not made the requisite showing that plaintiffs were either parties to the Commission proceedings or privies with GBE, nor had Conoco shown that the Commission proceedings afforded plaintiffs an effective opportunity to litigate.[4]

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[4] The court also expressed concern about whether the Commission order was final, noting that the parties had not advised

On appeal, Conoco reiterates its argument that collateral estoppel bars plaintiffs' entire theory of the case. Conoco contends that this court's opinion in *Leck v. Continental Oil Co.*, 971 F.2d 604 (10th Cir. 1992), handed down after the jury trial in this case, is dispositive on the issue. Conoco also argues that a state statute specifically prohibits plaintiffs' collateral attack on the Commission's order. In response, plaintiffs assert that Conoco failed to preserve and/or abandoned its collateral estoppel defense. Alternatively, plaintiffs assert that collateral estoppel does not apply because the privity requirement is not met, because the' issues resolved before the Commission were not the same as those plaintiffs raise in this proceeding, and because the Commission's order was not final at the time the district court ruled on Conoco's summary judgment motion. For the reasons set out below, we conclude that Conoco has clearly preserved for appeal the collateral estoppel issue. We further hold that Conoco has established the applicability of both the doctrine of collateral estoppel and the state statute prohibiting collateral attacks upon Commission orders.

II.

We turn initially to plaintiffs' arguments that the collateral estoppel issue is not properly before us on appeal. Plaintiffs first contend that Conoco failed to preserve this issue because it did not raise the matter in its motions for a directed verdict or for judgment as a matter

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the court whether an appeal had been taken to the Oklahoma Supreme Court. As we set out in text supra, the order was judicially affirmed during the pendency of this appeal.

of law. We disagree. Motions under Fed. R. Civ. P. 50 (a) for judgment as a matter of law test whether there is a "legally sufficient evidentiary basis for a reasonable jury to find" for the moving party. These motions thus challenge the sufficiency of the evidence rather than the correctness of questions of law. A party who properly raises an issue of law before the case goes to the jury "need not include the issue in a motion for a directed verdict in order to preserve the question on appeal." *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370 (9th Cir. 1987); *see also Jurgens v. McKasy*, 927 F.2d 1552, 1557 (Fed. Cir.), *cert. denied*, 113 S. Ct. 281 (1991); 9 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2540, at 617 (1971) (when the trial court denies a Rule 50 motion, both that denial "and errors of law in the trial may be raised on appeal"). As described below, the parties and the trial court agreed that the issue of collateral estoppel was a legal question separate from the sufficiency of the evidence. Conoco may thus raise the issue on appeal notwithstanding its omission from Conoco's Rule 50 motions.

In arguing to the contrary, plaintiffs fail to make the critical distinction between summary judgment motions raising the sufficiency of the evidence to create a fact question for the jury and those raising a question of law that the court must decide. *See Jurgens*, 927 F.2d at 1557. Their reliance on *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1417 (1993), is therefore misplaced. In their citations to *Whalen*, plaintiffs do not recognize that the case involved both types of motions and treated them separately. The defendants in *Whalen* filed "motions at various stages of litigation to

challenge the sufficiency of the evidence," *id.* at 1250, which were denied. The defendants also filed a summary judgment motion that "challenged the legal sufficiency" of certain documents, claiming that they did not meet applicable statutory requirements, *id.* at 1251. This motion was also denied.

In arguing here that Conoco cannot appeal the denial of summary judgment, plaintiffs mistakenly rely on language in *Whalen* directed at the appealability of the motions raising the sufficiency of the evidence. *See id.* at 1250-51. That discussion is not relevant to the appealability of the legal question at issue here.[5] It is true that in considering the motion raising the legal question, the court in *Whalen* originally held that the issue was not appealable because it had not been pursued in the defendants' motion for directed verdict. *See id.* at 1251 & n.6. However, the court corrected this ruling on rehearing and held that the issue had in fact been preserved and that the court's previous refusal to consider it was erroneous. *See id.* at 1254. In arguing here that Conoco is barred by its alleged failure to raise the issue in its motion for directed verdict, plaintiffs improperly rely on language from that portion of the original *Whalen* opinion that was modified on rehearing.

Plaintiffs also assert that Conoco abandoned the issue below. In so doing, plaintiffs' argument fails to reflect accurately the entirety of the trial court proceedings on

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[5] Plaintiffs citation to *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1551 (10th Cir. 1989), *cert. denied*, 114 S. Ct. 29-I (1993), is likewise inapposite because the challenge there was to the sufficiency of the evidence.

this issue. Conoco began arguing its motion for directed verdict by discussing the effect of the Commission order. The court questioned Conoco's counsel on the extent to which the court was bound by the Commission proceedings, and counsel voiced his belief that the court was not bound on the issue of drainage because the Commission cannot assess money damages. Aplee. app. at 7. After further discussion indicating some confusion and uncertainty on the part of counsel and the court, the court stated:

> [M]y inclination is to try to let this jury pass on as many of those factual determinations as is possible, in order to perhaps allow an appellate court . . . to finally sort out these dichotomies and so forth as best they can, rather than for me to try to say I'm precluded, as a matter of law, or they are precluded, as matter of law, and so forth.

*Id.* at 9.[6]

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[6] The primary source of confusion appears to be the fact that the Commission has jurisdiction only to resolve conflicts which exist among correlative rights "within a common source of supply and thus affect[ ] the public interest in the protection of production from that source as a whole." *Samson Resources*, 702 P.2d at 22. The Commission has no jurisdiction over "a dispute between private parties in which the public interest in correlative rights is not involved." *Id.* at 23. Plaintiffs argued below, and continue to argue on appeal, that their judicial proceeding is not barred by the Commission order because they are asserting only private rights. As we discuss in text infra Part IIIB, we disagree with plaintiffs' characterization of the nature of the rights asserted here.

In response, plaintiffs' counsel pointed out that the court had

> already ruled in denying the motion for summary judgment, which was a motion based upon a legal argument rather than factual, that the doctrines of collateral estoppel and res judicata or res judicata in the Corporation Commission's ruling on the Great Bear application, do not deprive this [c]ourt of jurisdiction to determine the private right dispute.

*Id.* at 15. Significantly, plaintiffs' counsel went on to state:

> [W]hile it may be an argument that he can raise on appeal, I believe this [c]ourt, as the district court, is bound to follow the precedents established, which are as I have stated, and the case should not have judgment entered in favor of the Defendants on the basis of anything the Corporation Commission has done.

*Id.* at 16. The record as a whole makes clear that neither the court nor plaintiffs' counsel viewed Conoco's motions argument as a forfeiture of its right to raise on appeal its claim that the Commission orders are preclusive.

Plaintiffs also premise their abandonment argument on Conoco's alleged failure to object when the court instructed the jury that it could consider the Commission's orders as evidence but could not consider them binding or conclusive. We find incongruous plaintiffs' argument that Conoco's failure to object to a jury instruction bars it from raising on appeal a legal issue that plaintiffs agreed was a matter for the court to decide. We point out that while Fed. R. Civ. P. 51 bars a party who

does not object to the giving or the failure to give instructions from challenging on appeal the instructions given, Conoco here is not appealing the court's failure to give its proffered instructions. Rather, Conoco is contending that the court committed an error of law in ruling that the collateral estoppel doctrine is not applicable. Under these circumstances and in view of the position of the parties and the court which we have delineated above, we find no significance in Conoco's failure to object to the court's instructions.

III.

Concluding that the issue is properly before us, we turn to the merits of Conoco's argument that the trial court erred in refusing to apply principles of collateral estoppel to the Commission's orders. We 'must "give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state in which the judgments were rendered." *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587, 590 (10th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986). The Oklahoma courts follow the Restatement in describing collateral estoppel as issue preclusion. *See, e.g., Wilson v. Kane*, 852 P.2d 717, 722 n.23 (Okla. 1993) (citing *Restatement (Second) of Judgments* § 27 (1982)). "Under issue preclusion, once a court has decided an issue of fact or law necessary to its judgment, that issue may not be relitigated between the same parties or their privies in a suit on a different cause of action." *Id.* (emphasis omitted). Issue preclusion will prevent a collateral attack on a judgment only when the issue sought to be barred "has been 'fairly and fully' litigated" in the

prior proceeding. *Veiser v. Armstrong*, 688 P.2d 796, 800 (Okla. 1984).

A.

The district court concluded Conoco failed to establish that plaintiffs were either parties to the Commission proceedings or in privity with GBE. Observing that plaintiffs were not the initial applicants before the Commission and were represented by separate counsel, the court held that plaintiffs did not sufficiently control GBE's course of conduct in those proceedings. These factors are not significant, however, when viewed in the totality of the circumstances.

Prior to the commencement of the initial hearings before the ALJ, plaintiffs executed agreements with GBE authorizing GBE to proceed before the Commission on plaintiffs' behalf. These agreements gave GBE the authority to pursue in plaintiffs' names any actions GBE deemed appropriate. In addition to executing these agreements, plaintiffs also filed a formal motion to intervene in the Commission proceedings under Okla. Stat., tit. 52, § 87.2 and the Corporation Commission Rules of Practice. "Once a person is permitted to intervene, he becomes a party-litigant in the case with the right to raise and litigate independent issues." *Teleco, Inc. v. Corporation Comm'n*, 649 P.2d 772, 773 n.2 (Okla. 1982). Although the record on appeal does not indicate whether the Commission formally granted plaintiffs' motion, the motion was not necessary to enable plaintiffs to participate as parties in the Commission proceedings. Oklahoma provides by statute that:

> [T]hose persons . . . who are mineral owners or owners of the right to drill a well for oil and gas on the lands embraced within the subject area of an application or the owners of correlative rights within the common source of supply or supplies embraced within an application to the extent such owners are directly affected by such application, shall be proper parties to:
>
> . . .
>
> 3. present testimony or evidence at any hearing arising thereunder or relating thereto.

Okla. Stat., tit. 52, § 87.2A. Plaintiffs, as mineral owners on the lands covered by GBE's application, were thus statutorily designated as parties and entitled to present testimony and evidence. Finally, as recited above, plaintiffs did in fact appear in the hearings through their attorney. The Commission Rules of Practice state that "[e]very person appearing shall enter his appearance by stating his name and address. Thereafter, such person shall be deemed a party of record, unless specified otherwise." Aplt. supp. app. at 541. These circumstances clearly establish that plaintiffs were parties to the Commission proceedings as required to invoke the doctrine of collateral estoppel.[7]

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[7] We likewise conclude that plaintiffs were presented with the requisite opportunity to fully and fairly litigate the issues before the Commission. Both the statute and the Commission rules permitting plaintiffs to appear as parties authorized them to present evidence and testimony and otherwise meaningfully participate in the hearing.

B.

Plaintiffs argue on appeal that the issues resolved in the Commission proceedings were not the same issues presented at trial. They base this argument on the distinction drawn in Oklahoma law between the Commission's jurisdiction to protect the correlative rights of interested parties, that is, "all the rights and duties which exist between mineral owners with regard to a common source of hydrocarbon supply," and the court's jurisdiction to award damages in a controversy between two private concerns. *Pelican Prod. Corp. v. Wishbone Oil & Gas. Inc.*, 746 P.2d 209, 211-12 (Okla. Ct. App. 1987); *see also Samson Resources*, 702 P.2d at 22-23. Plaintiffs contend that the judicial proceeding was one to enforce only private rights. Plaintiffs further argue that no preclusive effect should be given to the Commission's ruling that Conoco acted as a prudent operator because that holding was not necessary to decide the issues before the Commission. We disagree.

The administrative rulings establish that GBE based its application for an additional well on its claim that uncompensated drainage was damaging its correlative rights. Plaintiffs joined in that claim. The original ALJ order held that "the existing well could drain all of the hydrocarbons underlying the unit," and that

> the Section 14 well would be able to recover all of the hydrocarbons that Section 14 is entitled to recover. To grant an additional well would not be in the interest of the prevention of waste and the protection of correlative rights. As long as the Section 14 well is capable of recovering all of

> the hydrocarbons in the unit no additional well is necessary.

Aplt. app., vol. III, at 388. The appellate ALJ, in affirming the initial report, reviewed the evidence and stated that no uncompensated drainage was occurring because GBE had and was exercising a fair opportunity to extract oil and gas from the common source. *Id.* at 396. The Commission likewise concluded that GBE had not established the need for an additional well, pointing out that "correlative rights of all owners in the common source of supply must be considered," and that "[the operator of a unit like Section 14 is obligated to take only that unit's fair share of gas from a well in the unit." *Id.* at 403. The Commission further held:

> [T]here is an affirmative duty on the part of that operator to not only protect correlative rights of owners in Section 14, but also to avoid harming the rights of offset owners through the taking of a disproportionate share of gas in the common source of supply. Protestants, including Conoco, have acted prudently in Section 14 by recovering a fair share of the gas but resisting the attempt of Great Bear to recover more than such fair share. Any drainage occurring in Section 14 is compensated for through production of the No. 1-14 Meacham well. To allow an additional well to be drilled and produced in Section 14 would result in damage to the correlative rights of owners in adjacent sections.

*Id.* The Commission's statement that Conoco acted prudently in its challenged operations was thus both a necessary and inevitable element of its determination that no improper drainage was occurring.

Plaintiffs stipulated below that "[t]he fiduciary duty owing from defendant Conoco to plaintiffs is the duty to conduct itself as a prudent operator." Aplt. app., vol. II, at 229. Likewise, the jury was instructed that "[in order to prevail on their claim for breach of fiduciary duty, the plaintiffs must establish . . . that Conoco failed to act as a prudent operator." Aplt. app., vol. II, at 289. Nonetheless, plaintiffs now attempt to draw a distinction between the Commission's ruling that Conoco had acted prudently because no uncompensated drainage was occurring and plaintiffs' claim at trial that the court had jurisdiction to award damages for Conoco's breach of its fiduciary duty to protect against drainage. Such a distinction, however, is not supported by either logic or state law.

As we pointed out in *Leck*, 971 F.2d at 606, "[d]rainage and correlative rights are, of course, directly related." In *Leck*, the mineral interest owners asserted before the Commission that the operator was permitting uncompensated drainage to occur by allowing production from another well in the same producing formation. After the Commission determined that their correlative rights were not being violated, the mineral owners filed suit alleging breaches of contract and of fiduciary duty for failure to protect against drainage. We held that the Commission's ruling collaterally estopped the owners from asserting that uncompensated drainage had occurred, pointing out that the Commission's finding of no violation of correlative rights necessarily included a finding that no drainage was occurring. *Id.* Our holding in *Leck* is equally applicable here. It is true that only the court may award damages for breach of contract. However when, as here, the judicial relief sought depends entirely upon the adjustment

and protection of correlative rights already ruled on by the Commission, the court is not at liberty to make such a award if the' Commission has concluded that no correlative rights have been violated. *See Pelican Production*, 746 P.2d at 212.[8]

C.

Plaintiffs argue that the Commission's order is not entitled to collateral estoppel effect because it was not final at the time the trial court ruled on the summary judgment motion. As we have noted, the Commission's order was affirmed while this appeal was pending.

Oklahoma provides by statute that "[n]o collateral attack shall be allowed upon orders, rules and regulations of the Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders, rules or regulations to the Supreme Court." Okla. Stat., tit. 52,

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[8] At oral argument, plaintiffs' counsel asserted that the Commission order held only that improper drainage had not been proven as of the date of the order. In so doing, plaintiffs apparently contend that the order therefore did not bar claims for improper drainage allegedly arising after the date the order was decided. We rejected the same argument in *Leck v. Continental Oil Co.*, 971 F.2d 604, 607 (10th Cir. 1992), holding that because the plaintiffs there had not applied to the Commission for a modification of the original order on the basis of changed conditions, or any other ground, the order was binding. Here the Commission decision came after the trial, and we have no indication that plaintiffs have sought a modification. Accordingly, our ruling in *Leck* is dispositive.

§ 111. This statute by its plain language is not limited in its effect' to those Commission orders already affirmed on appeal to the Supreme Court. Indeed we have refused to permit a collateral attack on a Commission order while such a judicial appeal of the order was pending. *See Chenoweth v. Pan Am. Petroleum Corp.*, 314 F.2d 63, 65 (10th Cir. 1963); *see also Amoco Prod. Co. v. Heimann*, 904 F.2d 1405, 1417 (10th Cir.) (holding that decisions by state oil conservation agencies may be entitled to collateral estoppel effect and citing *Chenoweth*), *cert. denied*, 498 U.S. 942 (1990).

Moreover, we believe the Oklahoma courts would give preclusive effect to a Commission order in these circumstances under that state's common law doctrine of issue preclusion. The Oklahoma decisions have not articulated a bright-line rule when addressing whether a decision is final for purposes of preclusion despite the pendency of an appeal. *Compare Stovall v. Continental Fed. Sav. & Loan Ass'n*, 635 P.2d 1336, 1338 (Okla. Ct. App. 1981) ("It is a long-standing legal principle that a judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies on the same cause of action so long as the judgment remains unreversed."), *cert. denied*, 460 U.S. 1070 (1983), *with Lewis v. Aubrey*, 404 P.2d 1005, 1008 (Okla. 1965) (holding that pending appeal rendered judgment nonfinal for purposes of collateral estoppel, but prohibiting further proceedings in second action until appeal resolved in order to serve the "ends of justice and 'the public policy of avoiding repetitious litigation' ").

Under the federal view, the pendency of an appeal does not prevent application of the collateral estoppel

doctrine unless the appeal involves a full trial de novo. *See* 18 C. Wright, A. Miller & H. Cooper, *Federal Practice & Procedure*, § 4433, at 308 (1981); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶ 0.416[3.-2], at III-322 to III-323 (2d ed. 1993). The majority of state courts follow the federal rule. *See* 18 *Federal Practice & Procedure*, § 4433, at 313; 1B Moore's, ¶ 0.416[3.-2], at III-326.

The federal rule is likewise embodied in the *Restatement (Second) of Judgments*. Under the Restatement, "[a]n administrative adjudication becomes preclusive when it has become final in accordance with the rules stated in 13 and 14 [of the Restatement]. It is not necessary that the administrative adjudication has been reviewed and affirmed by a court." *Restatement (Second) of Judgments* § 83 cmt. a (1980). Section 13 in turn states that "a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo." *Id.* § 13 cmt. f. Because the Oklahoma Supreme Court follows the Restatement in formulating its collateral estoppel doctrine, *see, e.g.*, *Wilson v. Kane*, 852 P.2d at 722 n.23; *Veiser v. Armstrong*, 688 P.2d at 799 n.7, we believe that court would adopt the Restatement position on finality under these circumstances.

We also find it significant that the Commission's order was judicially affirmed while this appeal was pending. In *Lewis v. Aubrey*, 404 P.2d 1005 (Okla. 1965), the Oklahoma Supreme Court faced the issue of whether the pendency of an appeal prevented that court from giving the appealed judgment collateral estoppel effect in the action before it. Although the court held that the appeal rendered the judgment nonfinal for collateral estoppel

purposes, it nonetheless prohibited further proceedings in the second action until the appeal of the first action had been decided. In our judgment, *Lewis* stands for the proposition that the Oklahoma courts would give a judgment preclusive effect once a pending appeal has been decided even though the judgment may not have been entitled to that effect under state law when the issue was initially raised.

Likewise in *Heinold Hog Mkt., Inc. v. McCoy*, 817 F.2d 81 (10th Cir. 1987), we were asked to decide whether, under Oklahoma law, a judgment could be given preclusive effect even though it was the subject of a pending appeal. Rather than decide the issue, we held our disposition in abeyance until the pending appeal had been resolved by affirmance and then gave the judgment preclusive effect. Given the similarity in circumstances, we consider it proper under *Lewis* and *Heinold* to give preclusive effect to the Commission's order here.

In sum, we conclude that the trial court erred in refusing to give the Commission's order preclusive effect. We further hold that the order, which determined that an additional well was not necessary because no uncompensated drainage was occurring, bars all of plaintiffs' claims for relief. Accordingly, we reverse and remand with instructions to enter judgment in accordance with this opinion.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| ROBERT AND ELIZABETH RUYLE; HARVEY AND MARJORIE FRANSEN; GEORGE AND YVONNE FRANSEN; and JAMES M. FRANSEN, | ) | |
| Plaintiffs | ) | No. CIV-91-379-W |
| vs. | ) | |
| CONTINENTAL OIL COMPANY, | ) | |
| Defendant. | ) | |

JUDGMENT

This action came on for trial before the Court and a jury, The Honorable Lee R. West, District Judge, presiding. The jury rendered its verdict with regard to the plaintiffs' claims for breach of the implied duty to fully develop, tortious breach of the implied duty to protect against drainage and breach of fiduciary duty and the Court decided the equitable issue of cancellation and issued Findings of Fact and Conclusions of Law thereon. Based upon the same, the Court hereby ORDERS that judgment be entered in favor of the plaintiffs and against the defendant and that plaintiff James M. Fransen recover of defendant Continental Oil Company actual damages in the sum of $1,464.90 and punitive damages in the sum of $30,000.00, that plaintiffs Harvey and Marjorie Fransen recover of defendant Continental Oil Company actual damages in the sum of $2,929.65 and punitive damages in the sum of $60,000.00, that plaintiffs George and Yvonne

Fransen recover of defendant Continental Oil Company actual damages in the sum of $13,183.65 and punitive damages in the sum of $250,000.00, that plaintiff Robert Ruyle recover of defendant Continental Oil Company actual damages in the sum of $19,160.25 and punitive damages in the sum of $400,000.00 and that plaintiff Elizabeth Ruyle recover of defendant Continental Oil Company actual damages in the sum of $19,160.25 and punitive damages in the sum of $400,000.00, all with interest thereon at the rate provided by law.

The Court further ORDERS defendant Continental Oil Company either to drill an additional well or wells as required to fully develop the mineral estate and to protect against drainage or to release its leases, save and except the Meacham 1-14 borehole, with plaintiffs James M. Fransen, Harvey and Marjorie Fransen and George and Yvonne Fransen and to commence compliance with the option to chooses within 120 days.

The Court further ORDERS that the plaintiffs shall recover of this defendant their costs of this action.

Dated at Oklahoma City, Oklahoma, this 3rd Day of September, 1992.

LEE R. WEST
UNITED STATES DISTRICT
JUDGE

ENTERED IN JUDGMENT
DOCKET ON 9-3-92

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| ROBERT AND ELIZABETH RUYLE; HARVEY AND MARJORIE FRANSEN; GEORGE AND YVONNE FRANSEN; and JAMES M. FRANSEN, Plaintiffs | ) | No. CIV-91-379-W |
| vs. | ) | |
| CONTINENTAL OIL COMPANY, Defendant. | ) | |

ORDER

On June 26, 1992, the jury returned a verdict in favor of the plaintiffs, Robert and Elizabeth Ruyle, Harvey and Marjorie Fransen, George and Yvonne Fransen and James M. Fransen, and against the defendant, Continental Oil Company (Conoco), and awarded actual damages, without regard to the net revenue interests owned by the plaintiffs, on each of the plaintiffs' claims[1] as follows:

| | |
|---|---|
| Breach of the implied duty to fully develop | $1,000,000.00 |
| Tortious breach of the implied duty to protect against drainage | $1,000,000.00 |
| Breach of fiduciary duty | $1,500,000.00 |

[1] These three claims were alternative theories of recovery. Because the plaintiffs are entitled to recover only once for the actual damages they have sustained, the plaintiffs recovered, in accordance with their respective net revenue interests, the sum of $1,500,000.00.

Pursuant to a stipulation entered into by the parties on June 22, 1992, the amount of actual damages each plaintiff would receive from the total amount awarded by the jury was to be decided in accordance with the respective net revenue interest owned by each plaintiff. These amounts are:

| | |
|---|---|
| James M. Fransen | $ 1,464.90 |
| Harvey and Marjorie Fransen | $ 2,929.65 |
| George and Yvonne Fransen | $13,183.65 |
| Robert Ruyle | $19,160.25 |
| Elizabeth Ruyle | $19.160.25 |

On June 29, 1992, the Court submitted the issue of punitive damages to the jury and the jury awarded the following amounts:

| | |
|---|---|
| James M. Fransen | $ 30,000.00 |
| Harvey and Marjorie Fransen | $ 60,000.00 |
| George and Yvonne Fransen | $250,000.00 |
| Robert Ruyle | $400,000.00 |
| Elizabeth Ruyle | $400,000.00 |

The matter now comes before the Court on the equitable issue of cancellation of the Fransens' oil and gas leases. Having requested, received and reviewed the parties' supplemental proposed findings of fact and conclusions of law, the Court makes its determination.

## Findings of Fact

1. The Fransens own the following mineral interests in Section 14, Township 12 North, Range 16 West, Custer County, Oklahoma:

| Owner | Net Mineral Acres | Net Revenue Interests |
|---|---|---|
| James M. Fransen | 5 | .0009766 |
| Harvey and Marjorie Fransen | 10 | .0019531 |
| George and Yvonne Fransen | 45 | .0087891 |

2. These mineral interests are subject to oil and gas leases that were subsequently assigned to Conoco.

3. Upon application of Conoco, the Oklahoma Corporation Commission designated Section 14 as a single 640-acre drilling and Upper Red Fork of the Des Moines common source of supply. The only well drilled in and producing from Section 14 is the Meacham 1-14 Well drilled in September 1980 and located in the southeast one-fourth of Section 14. Conoco is the operator of this well and owns a 44.10% working interest and a 37.5% net revenue interest in the well.

4. Conoco also owns a 34.517% working interest and a 29.178% net revenue interest in a well drilled in December 1980 by Anson Company in the southeast one-fourth of Section 15, Section 12 North, Range 16 West, Custer County, Oklahoma, known as the Downing 1-15 Well. This well was likewise completed in the Upper Red Fork formation of the Des Moines common source of supply.

5. The Fransens made demand on Conoco to protect their mineral interests from drainage by the Downing 1-15 Well by drilling a protection well in the western one-half of Section 14 and to further develop Section 14 by drilling an additional well or they would seek cancellation of their oil and gas leases.

## Conclusions of Law

1. In Oklahoma, cancellation is an appropriate remedy for a lessee's breach of the implied duties to protect the leased premises against drainage and to further develop the mineral estate but only if, in the circumstances of a particular case, justice between the parties demands such relief.

2. The jury has determined that Conoco breached both of these duties. The jury also determined by awarding punitive damages to disregard of the plaintiffs' rights and/or constituted oppression, fraud or malice.

3. Based upon the evidence, the Court finds that the equities in this case weigh in favor of some relief. Accordingly, Conoco shall either drill an additional well or wells as required to fully develop the mineral estate and to protect against drainage or release its leases with the Fransens, save and except the Meacham 1-14 borehole. Conoco must commence compliance with the option it chooses within 120 days.

4. All issues having now been decided by the jury or by the Court, the Court enters judgment accordingly.

ENTERED this 3rd day of September, 1992.

LEE R. WEST
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

| | |
|---|---|
| ROBERT AND ELIZABETH RUYLE; HARVEY AND MARJORIE FRANSEN; GEORGE AND YVONNE FRANSEN; and JAMES M. FRANSEN, Plaintiffs vs. CONTINENTAL OIL COMPANY, Defendant. | No. CIV-91-379-W |

ORDER

On September 3, 1992, judgment was entered in favor of plaintiffs Robert and Elizabeth Ruyle, Harvey and Marjorie Fransen, George and Yvonne Fransen and James M. Fransen, and against defendant Continental Oil Company (Conoco). The plaintiffs recovered actual damages that totaled $55,898.70[1] and punitive damages that totaled $1,140,000.00.

The matter now comes before the Court on Conoco's Motion for Judgment Notwithstanding the Verdict, Application for Remittitur and Motion for Partial New Trial. The plaintiffs have responded in opposition and based

---

[1] Pursuant to a stipulation entered into by the parties on June 22, 1992, the amount of actual damages each plaintiff would receive from the total amount of damages awarded by the jury was to be decided in accordance with the respective net revenue interest owned by each plaintiff and the judgment entered on September 3, 1992, reflected this calculation.

upon the parties' submissions and the record herein, the Court makes its determination.

The primary focus of all Conoco's arguments is that the award of punitive damages is improper, unwarranted and/or excessive. Indeed, Conoco has with limited exception not challenged the jury's findings of liability or the jury's award of actual damages.

Conoco has argued first pursuant to Rule 50(b), F.R.Civ.P.[2] that the Court erred in failing to direct a verdict in favor of Conoco on the issue of punitive damages at the close of all the evidence. Conoco has further challenged not only the jury's decision to award punitive damages but also the Court's alternative findings that title 23, section 9 of the Oklahoma Statutes did not apply to this case in light of the Oklahoma Supreme Court's decision in *Lee v. Good*, 832 P.2d 429 (Okla. 1992), and that there was clear and convincing evidence that Conoco was guilty of conduct evincing a wanton or reckless disregard for the rights of others, thereby allowing the jury to award punitive damages in an amount in excess of the amount of actual damages awarded.

In support of its request for remittitur, Conoco has contended that the Court erred in failing to advise the jury that the plaintiffs had requested that the leases

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[2] Effective December 1, 1991, Rule 50 was amended. Motions for directed verdict and for judgment notwithstanding the verdict are now designated as motions for judgment as a matter of law. This change emphasizes the correlation in the standards that govern Rule 50 motions and Rule 56 motions. The change was not intended to alter the existing standards by which district courts review such motions.

between Conoco and the Fransens be canceled and that such error make the award of punitive damages excessive. Conoco has argued that the plaintiffs should be given the choice of accepting a reduction in the amount of punitive changes which they recover (from $1,140,000.00 to $55,898.70) or retrying the issue of punitive damages.

Finally, in support of its request for a new trial under Rules 51 and 59(a), F.R.Civ.P., Conoco has complained that the Court erred when it permitted the plaintiffs to recall expert witnesses as rebuttal witnesses and when it gave or refused to give certain jury instructions. Conoco has also argued that a new trial on the issue of punitive damages is warranted because the Court erred in ruling that section 9 was inapplicable to this case, in permitting the recovery of punitive damages on claims that were time-barred and because the amount of punitive damages awarded is excessive and against the weight of the evidence.

In reviewing the evidence pertaining to punitive damages under Rule 50 most favorable to the plaintiffs and giving these parties the benefit of all reasonable inferences from such evidence, the Court finds that there is sufficient evidence in the record upon which the jury could properly award punitive damages to the plaintiffs. Furthermore, in examining such damages under Rule 59, the Court finds that the amount awarded is neither clearly, decidedly or overwhelmingly against the weight of the evidence nor so excessive to shock the judicial conscious. *E.g., Spaeth v. Union Oil Co.*, 762 F.2d 865 (10th Cir. 1985).

Likewise, the Court finds no error with regard to either the testimony of plaintiffs' expert witnesses, the instructions given or refused or the Court's rulings regarding the issue of punitive damages. No error of law or manifest injustice has occurred that requires this Court to set aside the jury's verdict or retry any issue in this lawsuit. *E.g.*, Rule 61, F.R.Civ.P.

Accordingly, the court DENIES the defendant's Motion for Judgment Notwithstanding the Verdict, Application for Remittitur and Motion for Partial New Trial.

ENTERED this 26th Day of October, 1992.

LEE R. WEST
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| ROBERT AND ELIZABETH RUYLE; HARVEY AND MARJORIE FRANSEN; GEORGE AND YVONNE FRANSEN; and JAMES M. FRANSEN, | ) | No. CIV-91-379-W |
| Plaintiffs | ) | |
| vs. | ) | |
| CONTINENTAL OIL COMPANY, | ) | |
| Defendant. | ) | |

ORDER

This matter comes before the Court on the Motion for Summary Judgment filed by the defendant, Continental Oil Company (Conoco), and the Motion for Partial Summary Judgment filed by plaintiffs, Harvey and Marjorie Fransen, George and Yvonne Fransen and James Fransen (collectively "the Fransens") and by plaintiffs Robert and Elizabeth Ruyle (the Ruyles). Based upon these submissions and the responses filed in opposition thereto, the Court sets forth the following undisputed facts and makes its determination.

1. The Fransens own mineral interests underlying Section 14, Township 12 North, Range 16 West, Custer County, Oklahoma (Section 14).

2. Conoco holds oil and gas leases covering these mineral interests.

3. The Ruyles likewise own mineral interests underlying Section 14.

4. The September 1980, Conoco drilled the Meacham No. 1-14 Well in the southeast one-fourth of Section 14.

5. In December 1980, Anson Company drilled the Downing No. 1-15 Well in the southeast one-fourth of Section 15, only 660 feet from Section 14. This well and the Meacham No. 1-14 Well were both completed in the upper Red Fork formation of the Des Moines common source of supply.

6. Conoco owns a working interest in the Downing No. 1-15 Well.

7. On May 28, 1986, Samson Resources Company (Samson), which had a working interest in the Meacham No. 1-14 Well, wrote to Conoco and complained of drainage caused by the Downing No. 1-15 Well.

8. In February 1987, Samson proposed the idea of drilling a second well in Section 14 to Conoco.

9. Conoco has refused to drill a second well in this section.

10. On October 30, 1990, Great Bear Exploration, Inc. (Great Bear), filed applications before the Oklahoma Corporation Commission (Commission) seeking a location exception and increased well density for Section 14.

11. Great Bear sought permission to drill a well into the upper Red Fork formation of the Des Moines common source of supply. The proposed well was to be located 660

feet east of the west line and 660 feet north of the south line of Section 14.

12. Conoco opposed each application.

13. The plaintiffs, through agreements executed between Great Bear and each plaintiff in January 1991, supported Great Bear's applications before the Commission.

14. On May 2, 1991, the Administrative Law Judge recommended that both applications be denied. On October 31, 1991, the Commission's Appellate Administrative Law Judge affirmed the initial report and this ruling was appealed to and affirmed by the Commission en banc on January 13, 1992.

The plaintiffs brought the instant action seeking actual and punitive damages for Conoco's alleged breach of the implied covenant to develop, breach of the implied covenant to protect against drainage and breach of certain fiduciary duties. The plaintiffs complained that the existing well in Section 14 was not sufficiently producing and that substantial drainage was occurring by reason of the Downing No. 1-15 Well. Conoco defended the action by claiming that there has been no substantial drainage, that any drainage that has occurred has been compensated, that the Meacham No. 1-14 is producing (or capable of producing) the plaintiffs' fair share of the common source of supply and that a prudent operator would not have drilled a second well in Section 14.

Summary judgment is appropriate when the materials submitted by the parties "show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law." Rule 56(c), F.R.Civ.P. In reviewing the parties' cross-motions for summary judgment and the plaintiffs' claims that Conoco has breached certain implied covenants and fiduciary duties, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

The covenants that are the subject of this lawsuit: the obligation to further develop the leasehold and the obligation to protect against drainage, are implied as a matter of law in oil and gas leases. *E.g., Pohlemann v. Stephens Petroleum Co.*, 197 F.2d 134, 136 (10th Cir. 1952). The burden of proving a breach of either of these covenants is on the lessor and an essential element of a lessor's claim is proof that a prudent operator would have drilled an additional or a protection well.[1] *Id.* At 137.

Generally, whether a party acts prudently is a question of fact in this case, Conoco's conduct requires evaluation by the ultimate fact finder. A genuine controversy exists with regard to whether Conoco acted as a prudent operator, after consideration of all competing interests and the correlative rights of the owners of interests in the common source of supply and such controversy precludes summary judgment in favor of either Conoco or the plaintiffs.

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[1] Conoco's actions as a fiduciary are likewise measured by the "prudent operator" rule. *Leck v. Continental Oil Co.*, 800 P.2d 224, 229 (Okla. 1989).

Conoco has also argued that the plaintiffs are barred by the doctrine of collateral estoppel[2] from litigating the issues in this lawsuit because these issues have been decided by the Commission. Under this doctrine, once an issue has been actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent litigation based on a different cause of action involving a party to the prior litigation.

When a state entity such as an agency or board acts in a judicial capacity, federal courts accord a decision by that entity the same preclusive effect, either to claims or issues, to which it would be entitled in the state's courts. *E.g., University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986). Thus, this Court must determine whether the Commission was acting in a judicial capacity when it ruled on Great Bear's applications and if so, whether Oklahoma courts would give preclusive effect to the Commission's rulings on these applications.

A review of the record indicates that the Commission gave adequate notice to the applicant and all parties either supporting or protesting the applications. The record also demonstrates that Great Bear had the opportunity to (and did) present legal argument and evidence

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[2] The plaintiffs have argued that Conoco has failed to plead this affirmative defense and therefore cannot assert the same at this time. The Court disagrees. Estoppel is listed as Conoco's fifth affirmative defense in its answer filed in March 1991. It is also identified as an issue in the parties' status report filed in April 1991. Thus, the plaintiffs cannot claim any surprise or prejudice.

and cross-examine witnesses. Accordingly, the Court finds that the Commission did act in a judicial capacity and further finds that Oklahoma courts have in similar situations accorded preclusive effect to Commission rulings. *See Amoco Production Co. v. Heimann*, 904 F.2d 1405, 1417 (10th Cir. 1990).

Having so found, the Court must now decide whether the instant plaintiffs are collaterally estopped from litigating the issues presented in this lawsuit. Oklahoma traditionally requires the following elements for the invocation of collateral estoppel: (1) the parties are the same or are "privies" of the original parties; (2) the causes of action are different; and (3) the issues presented in the subsequent proceeding were actually litigated and necessarily determined in the prior proceeding. *E.g., Uphoff v. Meier*, 184 Okla. 878, 87 P.2d 960 (1939). Oklahoma also require finality of the judgment or order that was entered in the prior proceeding to which determination of the issues was essential. *E.g., Benham v. Plotner*, 795 P.2d 510, 512 (Okla. 1990).

In applying these elements plus the requirement of finality[3] to the instant case, the Court finds that the doctrine of collateral estoppel does not bar litigation of the issues raised by the plaintiffs. The plaintiffs were not the initial applicants before the Commission. They did support Great Bear's applications but were represented by separate counsel. They did not control Great Bear's

---

[3] The parties have not advised the Court whether an appeal from the Commission's order has been lodged or whether the order has become final for failure on Great Bear's part to perfect an appeal.

course or conduct to the extent necessary to warrant a finding that they are "privies" of Great Bear and should be bound by the Commission's findings.

Furthermore, in deciding whether the issues addressed by the Commission are the same or different from those to be raised in this proceedings, the Court must consider the weight to be given to the evidence in each proceeding as well as the applicable burdens of proof. It must likewise consider whether there were any significant procedural limitations in the prior proceedings and whether effective litigation was limited by the nature or relationship of the parties before the Commission. Conoco had done no more than assert this affirmative defense in a conclusory fashion. Such is insufficient to invoke the doctrine of collateral estoppel.

The final argument raised by Conoco pertains to the plaintiffs' prayer for punitive damages. Conoco has argued that the plaintiffs are not entitled to an award of punitive damages because there is no evidence of any fraud, oppression or wanton or reckless conduct by Conoco. The Court finds this argument is premature.

It is this Court's practice to bifurcate the issues of liability and actual damages and the issue of punitive damages at trial. If the plaintiffs prevail in the first stage upon a cause of action that permits the recovery of punitive damages, then the Court will determine, under the appropriate standards, whether the plaintiffs will be permitted to present evidence of the defendant's conduct and financial condition in the second stage. Conoco's argument should be presented at that time.

Conoco's Motion for Summary Judgment should be and are hereby DENIED.

ENTERED this 20th day of February, 1992.

/s/ _____
LEE R. WEST
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| | | |
|---|---|---|
| ROBERT RUYLE, ELIZABETH RUYLE, HARVEY FRANSEN, MARJORIE FRANSEN, GEORGE FRANSEN, YVONNE FRANSEN, and JAMES M. FRANSEN, | ) | |
| Plaintiffs – Appellees, Cross-Appellants, | ) | No. 92-6402<br>No. 92-6411 |
| v. | ) | (D.C. #CIV-91-379-W) |
| CONTINENTAL OIL CO., | ) | |
| Defendant – Appellant, Cross-Appellee. | ) | |

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ORDER
Entered February 7, 1995

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Before SEYMOUR, Chief Judge, LOGAN and ANDERSON, Circuit Judges.

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This matter comes on for consideration of appellees'/cross-appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are

in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

by Opal A. Carter
Deputy Clerk

INSTRUCTION NO. 21A

OKLAHOMA CORPORATION COMMISSION

You are instructed that the matters presented to the Oklahoma Corporation Commission and findings and orders issued by the Oklahoma Corporation Commission in Cause CD No. 157683 and Cause CD No. 157684, Application of Great Bear Explorations, in 1991 and 1992, may be considered by you as evidence in this case but should not be considered as binding or conclusive as to any issue. You may consider such findings and orders and give them such weight, if any, as you may think they deserve.

* * *

[p. 435] that these people, despite what they did in the facts of this particular case, did not adequately and thoroughly protect our specific individual rights, as opposed to the other correlative.

Because otherwise, it seems to me that would be bound by – there couldn't be a drainage question or there couldn't be an excess well required ever here, which is, in effect, what an award here would be, if we say that that is the, quote, the "final determinant".

Now, I don't have any answers to an adjustment of all of these issues between the Corporation Commission and the district, state and federal court jurisdiction. I don't even purport to try to.

But it seems to me – and I'm not trying to preclude or make a ruling on it – my inclination is to try to let this jury pass on as many of those factual determinations as is possible, in order to perhaps allow an appellate court, either in the determination of the outcome of these cases, to finally sort out these dichotomies and so forth as best they can, rather than for me to try to say I'm precluded, as a matter of law, or they are precluded, as a matter of law, and so forth. I'm not ruling on your motion, but I think you get the gist of –

MR. GRIMES: I want to clarify my motion. I'm not asking that you do that. I agree exactly with what you told [p. 436] me. Sir, that's all I asked for.

The reason I raise this motion is, their evidence, the Plaintiffs' evidence that has come forth, did not address

the rights of the offset owners, at all, not one time, in my opinion.

Sir, that's what I'm saying is the obligation I'm talking about. I agree that they need to make that decision. They need to know that the Commission did this, but it is not binding upon them. I don't disagree.

THE COURT: Again, I'm not trying to shortcut your argument, but I'm not sure they have an obligation to present evidence that is favorable to you in the sense that the other people – you were protecting the other people and the other people need to be protected.

I think they do have an obligation to make a prima facie case that they have not been adequately protected, and it will be up to the jury to decide whether or not they have done that, if it meets the threshold level to get to the jury.

And in my opinion, I don't believe they have to come forth and say, Look, yes, correlative rights have to be protected and here is what they did, but that wasn't – they didn't do it right. I think they have stressed the positive of their burden of proof. I think they have attempted to do that. They would probably even attempt to, if they had an opportunity, to disguise your efforts in regard to the other

* * *

(2)

No. 94-1841

Supreme Court, U.S.
FILED
JUL 5 1995
CLERK

In The

# Supreme Court of the United States

October Term, 1995

ROBERT RUYLE, ELIZABETH RUYLE, HARVEY FRANSEN, MAJORIE FRANSEN, YVONNE FRANSEN, GEORGE FRANSEN, JAMES FRANSEN,

*Petitioners,*

v.

CONOCO, INC.,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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## QUESTIONS PRESENTED

1. Did Conoco sufficiently preserve for appeal the issue of whether petitioners were foreclosed by Oklahoma law of collateral estoppel from bringing claims based on Conoco's failure to drill an additional gas well which the Oklahoma Corporation Commission had expressly prohibited in proceedings where petitioners were parties supporting the additional well?

2. Regardless of whether collateral estoppel foreclosed petitioners' action, is the Court of Appeals' decision correct on the additional ground set forth in its opinion, and not challenged here, that Oklahoma law prohibits a collateral attack on an Oklahoma Corporation Commission order which is not facially void?

## PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENT

Respondent Conoco, Inc. was formerly named "Continental Oil Company" (Aplt. App. 1, caption). Respondent's parent company is E.I. du Pont de Nemours and Company. Respondent's subsidiaries which are not wholly owned are:

1 Big Sky Of Montana Realty, Inc.
2 C&L Processors Partnership
3 Cit-Con Oil Corporation
4 Conch International Methane Limited
5 Conoco Arabia Ltd.
6 Conoco Iraq Ltd.
7 Conoco Mexico Ltd.
8 Conoco Oriente Ltd.
9 Conoco Peru Ltd.
10 Conoco Venezuela Ltd.
11 Cure Inc.
12 Du Pont Energy Company
13 Excel Paralubes
14 Felix Oil Company
15 Gulf Coast Fractionators
16 Jupiter Holding, Inc.
17 Kettleman North Dome Association
18 Marine Preservation Association
19 Nelson Industrial Steam Company (NISCO)

**PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENT** – Continued

20 Oberrheinische Mineraloelwerke GmbH (OMW)
21 Petco Enterprises Ltd.
22 Petrocokes, Ltd.
23 Phoenix Park Gas Processors, Ltd.
24 Pocahontas Gas
25 Siam Conoco Land Ltd.
26 The Standard Shale Products Company
27 Tidelands Royalty Trust
28 Venture Coke Company

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## ADDITIONAL STATUTORY PROVISIONS INVOLVED

The following relevant statutory provisions under Oklahoma law are not set forth in the brief of petitioners.

52 Okla.Stat. 1991, § 87.1(e) provides in relevant part:

> The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the [Oklahoma Corporation] Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited.[1]

52 Okla.Stat. 1991, § 111 provides in relevant part:

> No collateral attack shall be allowed upon orders, rules and regulations of the [Oklahoma Corporation] Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders, rules or regulations to the [Oklahoma] Supreme Court.

## STATEMENT OF THE CASE

Five of the seven petitioners leased mineral interests to Conoco, Inc. ("Conoco") in Section 14, T14N, R16W,

[1] The statute was amended effective July 1, 1993, but the amendment was subsequent to trial and the quoted language is unchanged.

Custer County, Oklahoma ("Section 14"), and sued Conoco alleging contractual and tortious breaches of the duty to prevent drainage by drilling an additional offset well in Section 14. Petitioner's Appendix ("Pet. App.") at 2. The other two petitioners (the Ruyles), although not Conoco's lessees, joined the other five petitioners, alleging only breach of fiduciary obligations by failing to drill an offset well. Pet. App. at 2 n.1.

*Oklahoma Corporation Commission Proceedings:* By order of the Oklahoma Corporation Commission ("Commission") Section 14 and adjacent sections were established as single drilling and spacing units of 640 acres each for production from a common source of supply, pursuant to 52 Okla.Stat. 1991, § 87.1(a). Pet. App. at 3-4. The spacing order was in effect long before and at all relevant times relating to petitioners' claims herein. The spacing order allowed a single well to be drilled in Section 14, and Conoco was designated the operator of that well.[2] Additionally, Oklahoma statutory law prohibited anyone including Conoco from drilling any further wells into the spacing unit, except as permitted by the Commission. 52 Okla.Stat. 1991, § 87.1(e) provides:

> The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing

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[2] "A spacing order creates the unit, pools royalty interests within the unit, directs that only one well be drilled in the unit within a specific location and prohibits the drilling of a well at another location or operating a well drilled in violation of the spacing order." *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438, 442 n.19 (Okla. 1986), *cert denied*, 483 U.S. 1021 (1987).

> order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited.

The Commission acts in an "adjudicative capacity" when it makes orders establishing and allowing exceptions relating to drilling and spacing units. *Harry R. Carlile Trust v. Cotton Petroleum, supra,* 732 P.2d at 441-42. The Commission's adjudicative power is vested by Oklahoma constitutional mandate. *Monson v. State ex rel. Oklahoma Corporation Comm'n,* 673 P.2d 839, 842 and ns. 6 and 10 (Okla. 1983). When the Commission acts in an adjudicative capacity it is charged "with the responsibility of a 'court of record' " and is "treated as the functional analogue of a court of record." *Id.*

In October 1990 one of the interest holders in Section 14, Great Bear Exploration, Inc. ("Great Bear") filed an application with the Commission to allow Great Bear to drill an additional well in Section 14. Pet. App. at 4. In January 1991 petitioners each executed contracts with Great Bear, authorizing Great Bear to represent their interests in seeking the additional well and to contend that Section 14 was not being adequately protected from drainage. Pet. App. at 4. Petitioners additionally personally intervened to support Great Bear's application in the Commission, and appeared at each of the hearings through their own counsel. Pet. App. at 4, 12-13. Numerous interest owners including Conoco opposed the application; Conoco also contended that if any additional

well was allowed, Conoco and not Great Bear should be named the operator of that well.[3]

Great Bear and petitioners asserted in the Commission, as petitioners did in this case, that an additional well in Section 14 was needed to protect the unit from drainage. Three levels of Commission proceedings were conducted: The first was the full adjudicatory hearing before the Commission's Administrative Law Judge, resulting in an Initial Report; the second was an appeal to a separate Administrative Law Judge, resulting in an Appellate Report; and the third was an appeal to the full Commission, resulting in the Commission's final Order. Great Bear and petitioners pursued the application through all three levels, and the application and allegations of inadequate protection from drainage were found meritless at every level. Great Bear alone then appealed the Commission's order to the Oklahoma Supreme Court, and the order was affirmed. Pet. App. at 5.

The specific factual findings of the Commission and its two Administrative Law Judges were contained in their separate orders following the three separate proceedings in which petitioners participated. Each of these orders separately concluded, upon review of the evidence, that granting an additional well was not in the interest of protecting correlative rights of all the affected mineral owners. Each of the orders also concluded that

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[3] Appellant's Appendix in the Tenth Circuit ("10th Cir. Aplt.App.") at 387 (Commission's Administrative Law Judge's Order).

there was insufficient evidence of uncompensated drainage from Section 14.[4] The Commission additionally specifically found that Conoco had acted prudently by resisting the application to drill an additional well:

> The operator of a unit like Section 14 is obligated to take only that unit's fair share of gas from a well in the unit. As noted in *GMC Oil and Gas Co. v. Texas Oil and Gas Corp.*, 586 P.2d 731 (Okla. 1978), there is an affirmative duty on the part of that operator to not only protect correlative rights of owners in Section 14, but also to avoid harming the rights of offset owners through the taking of a disproportionate share of gas in the common source of supply. Protestants, including Conoco, have acted prudently in Section 14 by recovering a fair share of the gas but resisting the attempt of Great Bear to recover more than such fair share.

10th Cir. Aplt.App. at 403, ¶6.

Throughout all of these proceedings Conoco remained prohibited by Oklahoma statutory law and the Commission's pooling order from drilling an additional well into Section 14 – as did all parties including petitioners and Great Bear. This prohibition has continued

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[4] Uncompensated drainage, *i.e.*, drainage not compensated by counter-drainage, is the test for whether an additional well within a Commission drilling and spacing unit is warranted. *Leck v. Continental Oil Co.*, 971 F.2d 604, 606 (10th Cir. 1992). Drainage and correlative rights are directly related, and a Commission finding as to uncompensated drainage collaterally estops mineral owners who participate in the proceeding from relitigating that issue in a civil claim against the operator. *Id.* at 606-607.

from the time the spacing unit was established, throughout the Oklahoma Supreme Court's affirmance of the Commission's order rejecting the application for another well, and was still in effect when this brief was filed.

*District Court Proceedings:* Petitioners nevertheless brought this action against Conoco for its failure to drill the additional well into Section 14 which Conoco was indisputably prohibited by state law from drilling. Pet. App. at 5. Conoco defended these claims throughout the litigation by relying on the relevant Commission proceedings and orders discussed above, and by specifically relying on Oklahoma law of collateral estoppel.

Petitioners' assertion at p.5 that "[t]he only time this issue was asserted by Respondent prior to its brief before the Tenth Circuit, was in the pre-trial motion for summary judgment" is incorrect. Specifically, Conoco raised the issue (a) in its pleadings and in a status report, as recognized in the district court's order denying summary judgment (10th Cir. Aplt.App. 219, n.5); (b) in a pretrial motion in limine (10th Cir. Aplt.App. 200); (c) in the Final Pretrial Order (10th Cir. Aplt.App. 227-28, 233-34, 241-43); in its February 3, 1992 Trial Brief (district court Doc. 95); in requested but refused jury instruction nos. 11 and 12 (10th Cir. Aplt.App. 309-310, discussed below); *and* in post-trial motions discussed below.

Indeed, Conoco contends it also raised the collateral estoppel issue in its Fed.R.Civ.P. 50 motion for judgment as a matter of law, although the Court of Appeals' analysis proceeds on the assumption that Conoco did not do so. Conoco initially moved for judgment as a matter of law under Fed.R.Civ.P. 50(a) at the close of plaintiffs' evidence. Portions of the argument on that motion are

quoted and summarized in the Court of Appeals' opinion (Pet. App. at 9-10), and portions are also quoted by petitioners. At the close of all the evidence Conoco renewed its motion for judgment as a matter of law, but was given no opportunity by the district court for further argument. 10th Cir. Aplt.App. at 506.

As the Court of Appeals observed, the district court expressed sympathy with Conoco's contention that it was legally foreclosed from drilling the well which plaintiffs sued Conoco for *not* drilling, but expressed its confusion over the dichotomy under Oklahoma law between the jurisdiction of the Commission and the courts to decide civil claims like this one. Pet. App. at 9, quotation and note 6. The district court therefore allowed petitioners' claims to be submitted to the jury, which awarded actual and punitive damages.[5]

Conoco shows below that it was not necessary for it to raise the collateral estoppel issue in the motion for judgment as a matter of law to preserve the question for appeal. However, the concluding portion of the argument on the Fed.R.Civ.P. 50(a) motion – which is *subsequent* to

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[5] The district judge initially concluded that petitioners claim for punitive damages did not fall within the recent amendment to Oklahoma law requiring a finding of clear and convincing evidence of wanton conduct. 10th Cir. Aplt.App. at 513-14. When Conoco pressed the applicability of the amendment the judge stated he would have preferred to base his ruling on that ground, but since Conoco might be correct he would "make the necessary clear and convincing findings, if it is required to do so," and then briefly recited the necessary findings in the language of the statute. *Id.* There was utterly no basis for such a finding, an issue which the Court of Appeals found unnecessary to reach. Pet. App. at 10.

the portion of the argument quoted by petitioners at 9-10, shows that Conoco *did* renew the grounds set forth in the motion for summary judgment in the Fed.R.Civ.P. 50(a) motion. First Conoco's counsel explained the "anomalous situation" of holding Conoco liable for failing to drill a second well which it was prohibited from drilling:

> The Commission having found that we shouldn't, and to do so would violate a correlative right of the offsets, what if I go drill that well? I have automatically been placed in the position of breaching my duty to all of these offsets. Now I get sued by them. So I get recovery against me from this jury. The Commission, having found I didn't need to drill the well, prevents me from drilling the well. I go drill it because I don't want to get this drainage. Now I get hit by the offsets. I'm in a real anomalous situation, your Honor.

10th Aplt. Supp. App. at 571-72. The trial judge responded that he was "acutely aware of that," but that in view of the lack of a "clear-cut definition yet as to who controls what" as between the courts and the Commission, he believed he had no choice but to submit the case to the jury. *Id.* at 572. Conoco's counsel then made clear that he would not press the argument further *if* the judge had already decided he was going to rule the same way he had on the summary judgment motion:

> MR. GRIMES: I guess all the protection I'm arguing for is that *if you are going to turn me down relative to those, and you did in the Motion for Summary Judgment,* I have got to at least have the opportunity –
>
> THE COURT: *I'm going to. I'm not trying to shorten your argument, but I'm going to in this case,*

> *because it is not one that is so clear to me that, as a matter of law, I probably ought to take it away from the jury at this point.*

(Emphasis supplied.) *Id.* at 573. Then the court cautioned Conoco's counsel that although the court would allow introduction of evidence of the Commission proceedings, "I can't allow you to construe that as telling this jury or even implying that they are absolutely bound by that." *Id.* The court then denied all of the motions for judgment as a matter of law. *Id.* at 574.

Petitioners' argument here that Conoco did not request judgment as a matter of law based on the Commission's findings is directly contrary to what their counsel urged to the district court when the motion was being argued. As reflected in the Court of Appeals' opinion, petitioners' counsel urged to the district court that while the preclusive effect of the Commission's orders "may be an argument that [Conoco] can raise on appeal," the district court should "follow the precedents established, which are as I have stated, and *the case should not have judgment entered in favor of the Defendants on the basis of anything the Corporation Commission has done.*" (Emphasis supplied.) Pet. App. at 10.

Finally, in its motion for judgment as a matter of law under Fed.R.Civ.P. 50(b) Conoco complained that the district court had erred in failing to grant the Fed.R.Civ.P. 50(a) motion (10th Cir. Aplt.App. at 326). In briefing the motion and urging the impropriety of punitive damages and cancellation of Conoco's lease, Conoco contended that the evidence showed that "its actions were justified and in accordance with the rules, regulations and orders of the [Commission]" (*id.* at 330); that the Commission "is

the administrative body vested with the exclusive authority to authorize the drilling of another well" (*id.* at 331); and that "[p]laintiffs' evidence showed Defendant complied with the [Commission's] orders by refusing to drill a protection well." *Id.* at 335.

*The Court of Appeals' Decision*: The Court of Appeals has reversed on two independently sufficient grounds pressed on appeal by Conoco – only *one* of which is cited here by petitioners as a basis for review by certiorari. The first ground, which petitioners do challenge, is that collateral estoppel bars success on their claim since the dispositive facts have been decided against them. The second ground, which petitioners do *not* challenge, is that the petitioners' claim constitutes a "collateral attack" on the Commission's order:

> Conoco also argues that a state statute specifically prohibits plaintiffs' collateral attack on the Commission's order. . . . We further hold that Conoco has established the applicability of both the doctrine of collateral estoppel and the state statute prohibiting collateral attacks upon Commission orders.

Pet. App. at 6.

## SUMMARY OF ARGUMENT

Conoco did, but was not required to, raise the collateral estoppel defense in its motion for judgment as a matter of law. A motion for judgment as a matter of law is required to test the sufficiency of the adversary's evidence. It is also sufficient to preserve the right to appellate review on other errors, *i.e.*, issues of law, but is not

necessary if such issues are otherwise raised in the district court. This principle applies whether the error of law is raised throughout every step of the litigation – as in fact occurred here – or solely in a motion for summary judgment, as incorrectly contended by petitioners. Conoco preserved the question not only in its pleadings, its motion for summary judgment, the pretrial conference order, a pretrial motion in limine, and proposed jury instructions, but also in its motions for judgment as a matter of law under Fed.R.Civ.P. 50(a) and (b).

Even if Conoco had not raised collateral estoppel, however, the Court of Appeals' decision would be correct on the alternate ground, not challenged by petitioners here, that their action seeking to hold Conoco liable for failing to drill the additional well constituted a collateral attack on the Commission's order preventing the drilling of that well.

The remaining contentions of petitioners (their Propositions II - V) were not raised in the Court of Appeals, and are plainly meritless, as discussed in Proposition III below.

## ARGUMENT AND AUTHORITIES

### I. THE LEGAL ISSUE OF WHETHER PETITIONERS' CLAIMS WERE BARRED BY COLLATERAL ESTOPPEL WAS SUFFICIENTLY PRESERVED FOR APPEAL

Petitioners incorrectly characterize Conoco's appeal as one from the denial of a motion for summary judgment. Conoco appealed the *final* judgment in this case –

raising as its primary argument that petitioners were foreclosed by Oklahoma law of collateral estoppel and collateral attack from claiming damages for Conoco's failure to drill a well which it was prohibited from drilling, and which the Commission had expressly disallowed in proceedings where petitioners had advanced the same factual assertions. Conoco's contention that petitioners are collaterally estopped from relitigating those assertions was not restricted to its summary judgment motion, as discussed above, but was made at every opportunity throughout the litigation *including* in the motion for judgment as a matter of law.

However, assuming *arguendo* that Conoco did not adequately raise the issue in the motion for judgment as a matter of law, the question presented is whether the legal contention was adequately preserved by raising it elsewhere – not whether Conoco could appeal from the denial of summary judgment. The Court of Appeals recognized this in its holding rejecting petitioners' argument:

> Motions under Fed.R.Civ.P. 50(a) for judgment as a matter of law test whether there is a "legally sufficient evidentiary basis for a reasonable jury to find" for the moving party. These motions thus challenge the sufficiency of the evidence rather than the correctness of questions of law. A party who properly raises an issue of law before the case goes to the jury "need not include the issue in a motion for a directed verdict in order to preserve the question on appeal." [Citations omitted.]

Pet. App. at 7. This basis for the Court of Appeals' holding, along with the authority cited by the court, is

wholly ignored by petitioners. As the Court of Appeals observed in its opinion, "the parties and the trial court agreed that the issue of collateral estoppel was a legal question separate from the sufficiency of the evidence." Pet. App. at 7. That is why petitioners' counsel – in the very hearing where it is contended Conoco did not sufficiently preserve the issue of collateral estoppel – resisted Conoco's motion for judgment as a matter of law by asserting to the district court that the court had:

> already ruled in denying the motion for summary judgment, which was a motion based upon *a legal argument rather than factual,* that the doctrines of collateral estoppel and res judicata or res judicata in the Corporation Commission's ruling on the Great Bear application, do not deprive this Court of jurisdiction to determine the private right dispute.

(Emphasis supplied.) Pet. App. at 10. That is also why petitioners' counsel immediately thereafter told the district court that "it may be an argument that [Conoco] can raise on appeal. . . . " *Id.*

The Court of Appeals' holding is amply supported by authority which petitioners do not dispute. While a motion for judgment as a matter of law is necessary to challenge the sufficiency of the evidence,[6] such a motion

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[6] Fed.R.Civ.P. 50(a) provides that a motion for judgment thereunder is to test for whether there is a "legally *sufficient evidentiary basis* for a reasonable jury to find" for the opposing party on an issue. (Emphasis supplied.) *See* 9A Wright, Miller & Cooper, Federal Practice and Procedure § 2536 (1995) ("It is thoroughly established that the *sufficiency of the evidence* is not

is not necessary to preserve the right to appellate review on issues of law. *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370 (9th Cir. 1987) (holding motion in limine sufficient to preserve issue of law on statute of frauds: "As long as a party properly raises an issue of law before the case goes to the jury, it need not include the issue in a motion for a directed verdict in order to preserve the question on appeal."). *See also* 9A Wright, Miller & Cooper, Federal Practice and Procedure § 2540 (1995) (discussing Fed.R.Civ.P. 50(b) motion, stating: "If there have been errors at the trial, duly objected to, dealing with matters other than the sufficiency of the evidence, they may be raised on appeal from the judgment even though there has not been either a renewed motion for judgment as a matter of law or a motion for a new trial, . . . . " ).[7]

This applies equally to denials of summary judgment motions and other pretrial rulings. *See Equal Employment*

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reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court." (Emphasis supplied.)).

[7] *See also* 5A Moore's Federal Practice ¶50.12 at p. 50-106 (2d ed. 1995) ("The court of appeals will not pass on the *sufficiency of the evidence* supporting a judgment, where the appellant did not move in the trial court for judgment as a matter of law under Rule 50, except to the extent that it will determine if there was a complete absence of evidence to support the verdict, without regard to sufficiency, or if there was any plain error resulting in a manifest miscarriage of justice." (Emphasis supplied.) Even if Conoco's contention was regarded as one raising sufficiency of the evidence this case would fall within both exceptions, "complete absence of evidence" and "plain error," inasmuch as Conoco could not be held liable for breaching a duty by failing to perform an act which was prohibited by state law.

*Opportunity Comm'n v. Sears, Roebuck & Co.*, 839 F.2d 302, 353 n.55 (7th Cir. 1988) (reviewing denial of summary judgment motion, explaining: "As with other interlocutory orders that arise during the course of a case, denials of summary judgment are merged into a final judgment and then may be appealed. [Citations omitted.]");[8] *Jurgens v. McKasy*, 927 F.2d 1552, 1557 (Fed.Cir.), *cert. denied*, 502 U.S. 902 (1991) (cited by Court of Appeals, Pet. App. at 7).

Collateral estoppel and res judicata present questions of law, and have sometimes been allowed to be raised on appeal although never presented at all in the trial court. *See Lujan v. United States Dept. of the Interior*, 673 F.2d 1165, 1167-68 (10th Cir.), *cert. denied*, 459 U.S. 969 (1982),[9] citing *inter alia Westwood Chemical Co., Inc. v. Kulick*, 656

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[8] *See also Stewart v. United States*, 186 F.2d 627, 634 (7th Cir.), *cert. denied*, 341 U.S. 940 (1951) (deciding issues raised on appeal from denial of summary judgment motion, distinguishing appeal after final judgment from interlocutory appeal, noting that there was no dispute as to any issue of fact and holding the court "may properly consider any issue of law presented by the record.").

[9] Notably, in *Lujan* the related state court proceedings were finally concluded during the pendency of the federal appeal, as was also true here since the Oklahoma Court of Appeals affirmed and the Oklahoma Supreme Court denied certiorari on Great Bear's appeal from the Commission's order during the pendency of appeal in this case. The court in *Lujan* applied collateral estoppel, which it distinguished from *res judicata*, after finding that "the peculiar facts of this case and the interests of judicial economy suggest" the propriety of considering the issue for the first time on appeal. *Id.*, 673 F.2d at 1168.

F.2d 1224, 1227-28 (6th Cir. 1981) (indicating that corollary defense of *res judicata* should be considered whenever brought to the court's attention, discussing cases where it was raised at various stages of litigation including for the first time in motion for rehearing). *Cf., LaRocca v. Gold,* 662 F.2d 144, 147-48 (2nd Cir. 1981) (*sua sponte* applying collateral estoppel arising from state court proceedings, which had been raised as a defense in the district court, although both sides to the appeal urged the court to resolve the merits of the case).

Petitioners' assertion that Conoco planted a "time bomb set to go off on appeal" (p.5, Para. I) is particularly inappropriate after having told the district court in the Fed.R.Civ.P. 50(a) hearing that collateral estoppel "may be an argument that [Conoco] can raise on appeal. . . . " Pet. App. at 10. The "bomb" language which petitioners attribute to *Whalen v. Unit Rig, Inc.,* 974 F.2d 1248, 1251 (10th Cir. 1992), *cert denied,* 113 S.Ct. 1417 (1993) is an inaccurate quotation by petitioners of the statement in *Holley v. Northrop Worldwide Aircraft Services, Inc.,* 835 F.2d 1375, 1377 (11th Cir. 1988) that: "Summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal; . . . " The bomb metaphor is inept here for the very reason the Court of Appeals rejected petitioners' argument – that "plaintiffs fail to make the critical distinction between summary judgment motions raising the sufficiency of the evidence to create a fact question for the jury and those raising a question of law that the court must decide." Pet. App. at 7. *Holley* actually *supports* the Court of Appeals' holding in this case. The court held that no appeal from denial of summary judgment was available to a party who *admits* that the evidence at trial was "sufficient to be presented

to the jury," or was "supplemented or changed in some manner favorable to the party who opposed summary judgment." *Id.* at 1378. The court later continued:

> We hold only that a party may not rely on the undeveloped state of the facts at the time he moves for summary judgment to undermine a fully-developed set of trial facts which militate against his case.

*Holley, supra,* 835 F.2d at 1378.

Neither the Court of Appeals, the district court, nor petitioners have ever suggested that this is what occurred in the instant case. The bar to plaintiffs' claim was both purely legal and absolute – no amount of evidence on the merits could ever have changed the result. Moreover, Conoco raised early and throughout the litigation the dispositive legal contention that petitioners' claims were barred by collateral estoppel – and the district court was emphatically joined by petitioners in declaring that the legal issue raised should not prevent submission of the case to the jury, but should be one reserved for appeal. Pet. App. at 9-10.

None of the cases cited by petitioners address, much less dispute this analysis. For example, in the Ninth Circuit case which petitioners quote at length at pp.7-8 as their primary authority, *Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1358-59 (9th Cir. 1987), the court rejected an attempt to review denial of a motion for summary judgment on tortious interference and defamation claims after having tried the claims to a jury. No issue was presented there as to whether a Fed.R.Civ.P. 50(a) motion is required to preserve error on a question of law otherwise raised by appellant in the court below – and indeed

the Ninth Circuit fully agrees with the holding below as to that issue. *See Landes Constr. Co. v. Royal Bank of Canada, supra* (decided the same day as *Locricchio*), cited by the Court of Appeals in support of its holding, Pet. App. at 7. Similarly, a case from the Federal Circuit Court of Appeals is cited by and supports the Court of Appeals' decision, Pet. App. at 7, *Jurgens v. McKasy, supra* – confirming the irrelevance of the Federal Circuit case which petitioners incorrectly attribute to the District of Columbia Circuit (Pet. at 6), *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (Fed.Cir. 1986), *cert. dismissed*, 479 U.S. 1072 (1987) – and which also does not concern raising a legal issue omitted from a Fed.R.Civ.P. 50(a) motion.

Moreover, even the general proposition for which petitioners' cases are cited, although irrelevant here, is of questionable validity. For example, the Second Circuit decision petitioners cite in their petition at 6, *Chappell & Co. v. Frankel*, 367 F.2d 197 (2nd Cir. 1966), was not an appeal from a final decision at all. It was an attempted *interlocutory* appeal from denial of summary judgment under 28 U.S.C. §1292 (a)(1) on the ground that an injunction was sought. The Second Circuit has allowed an appeal from a denial of a summary judgment *after* final judgment, *Savarin Corporation v. National Bank of Pakistan*, 447 F.2d 727, 728 and 732 (2nd Cir. 1971), a decision which post-dates *Chappel*.[10] *See also* 10 Wright, Miller & Cooper, Federal Practice and Procedure § 2715 at pp. 636-37 (1983) (appeal from the denial of a motion for summary judgment must await "the entry of judgment following the trial on the merits."). *Cf.*, 9 Moore's Federal

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[10] Petitioners misstate the date of *Chappel* which is 1966, not 1946.

Practice ¶110.07 at pp.41-42 (2d ed. 1995) (rulings on pretrial matters including denials of summary judgment motions are "generally reviewable only to the extent that they affect the final judgment.").

Other contentions in petitioners' first proposition merit little discussion. Conoco did not abandon its claim that petitioners were barred by collateral estoppel, as the Statement of the Case above shows, and is reflected in the Court of Appeals' opinion, Pet. App. at 8-10. Failure of Conoco to object to the jury instruction relied upon by petitioners also did not waive Conoco's other repeated and emphatic objections that petitioners were collaterally estopped from pursuing this claim (Pet. App. at 10-11), particularly since the objections go to the issue of whether the question should go to the jury at all, and would not be curable by a reworded instruction. In any event, the district court refused Conoco's requested two jury instructions which would have explicitly precluded any recovery by petitioners based upon the Commission's spacing order and its order disallowing an additional well. Conoco's Requested Instruction 11 recited that the Commission "ordered that only one well could produce from the Des Moines common source of supply underlying Section 14;" that the Commission had "denied an application seeking authority to drill an additional well" in Section 14; and:

> You are instructed that the plaintiffs can recover no damages on their claims relating to their breach of duties for the failure to drill an additional well in Section 14 as the drilling of such an additional well is prohibited as a matter of law and by order of the Oklahoma Corporation Commission.

10th Cir. Aplt.App. at 309. Aside from this, the authorities are in agreement that Fed.R.Civ.P. 51 "does not require formality, and it is not important in what form an objection is made or even that a formal objection is made at all, as long as it is clear that the trial judge understood the party's position." 5A Moore's Federal Practice ¶51.04 at p.51-33. (2d. ed. 1995). *See also* 9A Wright, Miller & Cooper, Federal Practice and Procedure § 2553 at p.411 (1995) ("The failure to object may be disregarded if the party's position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing."). The trial judge in the instant case had made this imminently plain in the Fed.R.Civ.P. 50(a) hearing: "I'm not trying to shorten your argument, but I'm going to in this case, because it is not one that is so clear to me that, as a matter of law, I probably ought to take it away from the jury at this point." 10th Aplt. Supp. App. at 573.

## II. OKLAHOMA'S PROHIBITION ON COLLATERAL ATTACKS OF COMMISSION ORDERS INDEPENDENTLY SUPPORTS THE RESULT IN THIS CASE

Even if petitioners' contention that Conoco was procedurally barred from relying on collateral estoppel had merit, certiorari would be unwarranted here, since petitioners do not challenge an independent and non-waivable basis for the Court of Appeals' holding: that petitioners' action constituted an impermissible collateral attack on the Commission's orders disallowing more than a single well in Section 14.

Oklahoma prohibits collateral attacks on the Commission's orders. 52 Okla.Stat. 1991, § 111 provides:

> No collateral attack shall be allowed upon orders . . . of the Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders . . . to the Supreme Court.

*See Woods Petroleum Corp. v. Sledge*, 632 P.2d 393, 396 (Okla. 1981).[11]

Under Oklahoma law the courts lack jurisdiction to entertain a claim which constitutes a collateral attack on a Commission order,[12] and jurisdiction cannot be waived. Fed.R.Civ.P. 12(h)(3). Hence, petitioners' assertion that Conoco waived the collateral estoppel issue has no application as to the Court of Appeals' holding that petitioners' claim constitutes a collateral attack on the Commission's order.

The Oklahoma courts have described the meaning of the term "collateral attack" as follows:

> "A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law; that is, in some other way than by appeal, writ of error, certiorari, or motion for a new trial."

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[11] The only method to successfully launch a collateral attack on a Commission order is to show on the face of the order that it is void because the Commission lacked jurisdiction over subject matter, the parties, or to pronounce the particular decision. *SKZ, Inc. v Petty*, 782 P.2d 939, 943 (Okla. 1989).

[12] *E.g., Drake v. Southwest Davis Unit*, 698 P.2d 15, 16-17 (Okla. 1985); *Pelican Production Corp. v. Wishbone Oil & Gas, Inc.*, 746 P.2d 209, 212 (Okla.Ct.App. 1987).

*State ex rel. Commissioners of the Land Office v. Corporation Comm'n*, 590 P.2d 674, 677 (Okla. 1979).[13] One of the cases upon which petitioners rely elaborates the importance which Oklahoma places upon protecting *both* the orders of district courts, *and* orders of the Commission, from collateral attacks in the other forum. *Fent v. Oklahoma Nat. Gas Co.*, 1994 Westlaw 534502, 1994 Okla. LEXIS 125, Docket No. 79,243 (Okla. October 4, 1994). "The law's protection against an impermissible collateral attack prevents both the district court and the Commission from encroaching upon each other's jurisdiction by entertaining inquiries into issues that stand decided by the other tribunal." *Id.*, 1994 Westlaw 534502 at p.*5.

*Pelican Production Corp. v. Wishbone Oil & Gas, Inc.*, 746 P.2d 209 (Okla.Ct.App. 1987) illustrates the application of these principles in analogous circumstances. In *Pelican* two oil and gas companies had drilled wells into the same section. One company sued the other alleging conversion of oil and gas from the formation for which its well had been designated as the unit well. *Id.* at 211. The same contention had been previously made to, and rejected by, the Oklahoma Corporation Commission. The district court dismissed for lack of subject matter jurisdiction, holding that the action constituted a collateral attack on the Commission's order. *Id.* On appeal, the Court of Appeals acknowledged that the Commission had no power to award damages in a private lawsuit for conversion. However, the court affirmed, holding the district

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[13] Even an action for damages which seeks only a clarification of a Commission order is a collateral attack, since any such clarification must be made solely by the Commission. *E.g., Drake v. Southwest Davis Unit*, 698 P.2d 15, 16-17 (Okla. 1985).

court had properly concluded that it lacked subject matter jurisdiction since the Commission's determination that the defendant was not in violation of its drilling and spacing order precluded any lawsuit for conversion. *Id.* at 212. The court observed that the Commission's order had become final, and that the plaintiff was "attempting to relitigate this issue in district court and, thus, is attacking the Commission's order collaterally." *Id.*[14] Although petitioners cite the wrong rule, their statement at n.6 that *Pelican* is not precedential is correct; however, under Oklahoma law such opinion "shall be considered to have persuasive effect." 12 Okla. Stat. 1991, Ch.15, App.2, Rule 1.200(C)(B).

Here, the Commission has established Section 14 as a drilling and spacing unit and has rejected petitioners' efforts to drill more than the single allowed well in the unit. Petitioners action against Conoco for actual and punitive damages because of Conoco's *failure* to drill the well which the Commission has disallowed is thus an impermissible collateral attack on the Commission's orders.

The Court of Appeals expressly so held in this case in its opinion. "We further hold that Conoco has established the applicability of *both* the doctrine of collateral estoppel *and* the state statute *prohibiting collateral attacks* upon Commission orders." (Emphasis supplied.) Pet. App. at

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[14] This is in accord with other decisions, including those applying other states' laws. *E.g., Mize v. Exxon Corp.*, 640 F.2d 637, 639-40 (5th Cir. 1981); *Amoco Production Co. v. Heimann*, 904 F.2d 1405, 1417 (10th Cir.), *cert. denied*, 498 U.S. 942 (1990); *Mayer v. Tidewater Oil Co.*, 218 F.Supp. 611, 612-15 (W.D.La. 1963).

6.[15] Petitioners do not challenge this holding in their petition for a writ of certiorari. Thus, even if they were correct in contending that Conoco failed to preserve its contention as to collateral estoppel, it would not change the result in this case.

## III. PETITIONERS' OTHER ARGUMENTS WERE NOT RAISED BELOW AND ARE MERITLESS

The arguments made by petitioners in their Propositions II, III, IV and V were never presented to the Court of Appeals, notwithstanding that collateral estoppel was the paramount issue presented by Conoco on appeal – a sufficient reason in itself to decline review of the issues on certiorari.[16] These new arguments also lack merit.

*Due Process*: The due process argument in Proposition II has never been raised before by petitioners at any stage of this litigation. It is purportedly founded on the limited jurisdiction of the Commission, since the Commission is not authorized to adjudicate a claim for damages based on the drainage which it found had not occurred in this case. The fallacy of that argument is apparent. Collateral estoppel does not require adjudication of any particular claim, as does *res judicata*. Collateral estoppel precludes relitigating the same *issues* of fact or

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[15] *See also* the Court's discussion of collateral attack in the context of petitioners' contention that the pendency of Great Bear's appeal from the Commission's order prevented it from being final for purposes of collateral estoppel, Pet. App. at 17-18, quoting and discussing 52 Okla.Stat. 1991, § 111.

[16] Stern, Gressman, Shapiro and Geller, Supreme Court Practice § 6.26 (7th ed. 1993). *E.g., Delta Air Lines, Inc. v. Rosemary August*, 450 U.S. 346, 362 (1981).

law which the parties have previously litigated (Pet. App. at 11) – here the factual question of whether uncompensated drainage occurred.

Petitioners primarily rely for their due process argument on *Tidewater Oil Co. v. Jackson*, 320 F.2d 157 (10th Cir.), *cert. denied*, 375 U.S. 942 (1963), holding that a Kansas Corporation Commission order allowing waterflood operations did not prevent plaintiffs' action for damages for trespass and nuisance for the destruction of their wells. The Kansas Corporation Commission had only *permitted* the flooding operations (not mandated them), and expressly stated in its order that " 'an action for damages for the flooding of producing wells may be available to the owners of such wells. . . . ' " *id.* at 160.[17] Here, of course, Conoco and all others were *prohibited* by the Commission's order from drilling another well, so plaintiffs have not sued Conoco for failing to take action which was within its lawful prerogative – but for failure to *defy* the lawful order of the Commission prohibiting any additional well.

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[17] The court in *Tidewater* rejected the proposition that the Kansas Corporation Commission's orders could not otherwise have preclusive effect, stating: "We think, however, that a suitor may have a full day in court in an administrative tribunal, on matters within its competence, quite as effectively and conclusively as any other adjudicatory tribunal." *Id.* at 161. Notably, the court reversed the punitive damages awarded notwithstanding that the Kansas Corporation Commission had expressly held it was not deciding any right to future actions for damages, because the operations were done under color of that Commission's permission. *Id.* at 165.

*Leck v. Continental Oil Co.*, 800 P.2d 224 (Okla. 1989), relied upon by petitioners at pp.13-14,[18] was a decision on a certified question from the Tenth Circuit, and the Oklahoma Supreme Court expressly did not reach the issue of the collateral estoppel effect of the Commission's findings because it was "not ripe for review." *Id.* at 228. However, both the district court and the Tenth Circuit in that case did subsequently address the collateral estoppel issue, and reached the same result as in this case. *Leck v. Continental Oil Co.*, 971 F.2d 604, 606-607 (10th Cir. 1992) (not cited by petitioners).

Where a state conservation agency acting in a judicial capacity resolves facts properly before it, and the parties have had an adequate opportunity to litigate, as here, it is well settled that the agency's decision is entitled to the same preclusive effect to which it would be entitled in the state's courts. *Amoco Production Co. v. Heimann, supra,* 904 F.2d at 1414-15.

The report of an appointed advisory committee to the Commission quoted by petitioners at 15, which is not in the record, is one making recommendations for a statutory *change* of the law, and those recommendations have never been adopted. Moreover, the recommendations are contained in a section of the report dealing only with "Environmental Pollution Prevention and Abatement," not involved in this case, and even as to that narrow area proposes to keep the "Commission findings of *rules* violation from being treated as dispositive as to liability in civil cases" (emphasis supplied), also not involved here.

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[18] Petitioners cite the case for their assertion that applying collateral estoppel denies them due process.

The other cases cited by petitioners are either irrelevant to the issues presented here, or actually support Conoco. *Fent v. Oklahoma Nat. Gas Co.*, 1994 Westlaw 534502, 1994 Okla. LEXIS 125, Docket No. 79,243 (Okla. October 4, 1994), cited by petitioners at 13 n.5 and 15 n.6 is illustrative. The court there did not even reach the issue for which petitioners cite the case in their note 5, that "claims for money damages based upon breaches of contract and in tort are properly before a district court, not the Commission." Rather, the court applied the doctrines of both *collateral estoppel* and *collateral attack* to prevent relitigation of the final prior determination that the district court had jurisdiction of the claims – carefully noting as to each doctrine that it applies equally where the Commission is the first to decide the relevant questions. *Fent, supra*, 1994 Westlaw 534502 at pp. *4-5. And in *Carris v. Thomas*, 1995 Westlaw 142562, 1995 Okla. LEXIS 44, Docket No. 82,952 (Okla. April 4, 1995) cited by petitioners at 13 n.5, the court held that an arbitration proceeding to which two defendants in a subsequent civil case were not parties did not collaterally estop plaintiff, particularly because the arbitration award did not reflect the issues actually determined.

*Standard of Proof*: The argument that petitioners were subject to a different standard of proof and thus cannot be barred by collateral estoppel is spurious. The "substantial evidence" standard of proof referred to in their note 7 is not the proof required to show uncompensated drainage, but to show "that there has been a change in conditions or a change in knowledge of conditions" to justify departure from the original spacing order which prohibited more than one well. *Mustang Production Co. v. Corporation Comm'n*, 771 P.2d 201, 203 (Okla. 1989). Here

the Commission did not disallow an additional well because of a failure of the applicant and petitioners to show the alleged drainage was a new condition or was recently discovered. Relief was denied because there was no showing of the alleged uncompensated drainage *at all.* The Commission held that:

> Any drainage occurring in Section 14 is compensated for through production of the [existing well]. To allow an additional well to be drilled and produced in Section 14 would result in damage to the correlative rights of owners in adjacent sections.

10th Cir. Aplt.App. at 403, ¶6.

Moreover, even if the "substantial evidence" standard had been applied it would not assist petitioners in their argument. First, it is if anything a *lesser* burden than the preponderance standard which plaintiffs had in this case. *See Mustang Production Co. v. Corporation Comm'n,* 771 P.2d 201, 204 (Okla. 1989) ("Substantial evidence" means " 'something more than a scintilla; possessing something of substance and of relevant consequence carrying with it a fitness to induce conviction, but remains such that reasonable men may fairly differ on the point of establishing the case.' "). Second, even if it could be argued that the "substantial evidence" standard imposed a heavier burden of persuasion than the "preponderance" standard, it is plainly not a "significantly heavier burden," as would be necessary to deprive it of collateral estoppel effect.[19]

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[19] Collateral estoppel in this case is governed by state law, and "the Oklahoma Supreme Court follows the Restatement in

*Notice in Commission Proceeding*: Petitioners' assertion at 17 that "they did not receive proper notice of the proceedings" is unclear. If petitioners mean they actually did not receive notice, the assertion is contrary to the record, as reflected in the Court of Appeals' opinion, Pet. App. at 4 and 12-13 and Conoco's Statement of the Case.[20] Further, the "drainage issues" were specifically denominated in petitioners' contract with Great Bear and were the centerpiece of the Application before the Commission in the proceedings where they intervened and fully participated as parties through their own separate counsel.

If petitioners mean that due process required notice that the doctrine of collateral estoppel applied to the Commission's adjudication of fact issues, petitioners cite no authority for the assertion, and Conoco is not aware of any. Even authority cited by petitioners shows that collateral estoppel applies equally regardless of whether the

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formulating its collateral estoppel doctrine," Pet. App. at 19. Restatement of Judgments (Second) § 28(4) (1982), also cited by petitioners in their note 7, provides that collateral estoppel does not apply where the party against whom it is asserted "had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action;. . . . " *See also* comment *f*.

[20] All Commission adjudicative proceedings must be accompanied by notice which satisfies federal and state due process standards, *Harry R. Carlile Trust v. Cotton Petroleum Corporation*, 732 P.2d 438, 442-43 (Okla. 1986), *cert denied*, 483 U.S. 1021 (1987), an issue never raised by petitioners at any stage of this case.

first tribunal to decide the matter is a district court or the Commission.[21]

*Right to Jury Trial*: Finally, petitioners' argument in Propositions IV and V that their right to trial by jury has been infringed by applying collateral estoppel is one already expressly rejected by this Court. *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 335-37 (1979).

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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[21] *Fent v. Oklahoma Nat. Gas Co., supra*, 1994 Westlaw 534502 at pp. *4-5.